IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-

76-1563

COCA COLA BOTTLING COMPANY OF PUERTO RICO, INC., SEARS ROEBUCK DE PUERTO RICO, INC., PAN AMERICAN WORLD AIRWAYS, INC., and VISTAMAR MOTORS, S.A., by themselves and on behalf of all the members of the class, *Appellants*

vs.

JOSE M. ALONSO-GARCIA, Manager, State Insurance Fund, et al, *Appellees*

On Appeal from the United States District Court for the District of Puerto Rico

JURISDICTIONAL STATEMENT

DONALD M. HALL
RAFAEL PEREZ-BACHS
McCONNELL VALDÉS KELLEY
SIFRE GRIGGS & RUIZ-SURIA
G. P. O. Box 4225
San Juan, Puerto Rico 00936
For Appellants

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 77-

COCA COLA BOTTLING COMPANY OF PUERTO RICO, INC., SEARS ROEBUCK DE PUERTO RICO., INC., PAN AMERICAN WORLD AIRWAYS, INC., and VISTAMAR MOTORS, S.A., by themselves and on behalf of all the members of the class, *Appellants*

vs.

JOSE M. ALONSO-GARCIA, Manager, State Insurance Fund, et al, *Appellees*

On Appeal from the United States District Court for the District of Puerto Rico

---

JURISDICTIONAL STATEMENT

OPINION DELIVERED BY THE COURT BELOW

Appellants appeal from the as yet unreported judgment and order of the United States District Court for the District of Puerto Rico, sitting as a three-judge court, filed and entered on December 27, 1976, and February 8, 1977, respectively. An opinion and order relative to said judgment was filed and entered

on December 27, 1976. These documents are set forth in the Appendix hereto, *infra*, pp. 1a-8a.

GROUNDS ON WHICH THE JURISDICTION OF THIS SUPREME COURT IS INVOKED

Appellants instituted this action in the District Court for the District of Puerto Rico under 42 U.S.C. § 1983 and the 5th and 14th Amendments to the Constitution of the United States of America and their jurisdictional counterparts, 28 U.S.C. 1331(a) and 1343(3). Declaratory relief was also sought pursuant to 28 U.S.C. 2201 and 2202, seeking to have portions of Act No. 45 of July 1, 1935 of the Commonwealth of Puerto Rico declared unconstitutional and seeking the issuance of an interlocutory and permanent injunction against the enforcement of such portions of the Act.

After trial, the three-judge court convened pursuant to 28 U.S.C. §§ 2281-2284 filed and entered the judgment and the order appealed from, overruling the constitutional challenges raised in this case and denying the relief requested. A timely motion to alter or amend the judgment was filed and served on Janu- 7, 1977. Said motion tolled the time to file a notice of appeal, *Communist Party of Indiana* vs.*Whitcomb*, 414 U.S. 441, reh. den. 415 U.S. 952 (1974), until it was denied by the order of February 8, 1977. The opinion and judgment and the order of the District Court involved herein were filed and entered on December 27, 1976 and February 8, 1977, respectively. A notice of appeal to this Court was filed on March 10, 1977.

Appellants, for themselves and on behalf of each and all other persons similarly situated who are em-

ployers in Puerto Rico subject to the provisions of the Act, sought relief of those provisions of the Act which operate to deny them a "preterminate hearing on contested workmen's compensation premiums". *North Georgia Finishing, Inc.* vs. *Di-Chem, Inc.*, 419 U.S. 601 (1975); *Board of Regents* vs. *Roth*, 408 U.S. 564 (1972); *Fuentes* vs. *Shevin*, 407 U.S. 67 (1972); *Boddie* vs. *Connecticut*, 401 U.S. 377 (1971); *Sniadach* vs. *Family Finance Corp.*, 395 U.S. 337 (1969). That these rights are substantial is implicit in the opinion of the District Court, in the very convocation of a three-judge court and explicit in the cases just cited. *Idlewild Bon Voyage Liquor Corp.* vs. *Epstein*, 370 U.S. 713 (1962); *Mayhue's Super Liquor Store, Inc.* vs. *Meiklejohn*, 426 F.2d 142 (5th Cir., 1970).

The jurisdiction of this Court to review the decision of the District Court on direct appeal is conferred by 28 U.S.C. § 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case. *Hicks* vs. *Miranda*, 422 U.S. 332 (1975); *Allen* vs. *Board of Election*, 393 U.S. 544 (1969); *Florida Lime & Avocado Growers* vs. *Jacobsen*, 362 U.S. 73 (1960); *Law Students Research Council* vs. *Wadmond*, 401 U.S. 154 (1971); *Ly[illegible]* vs. *Household Finance Corp.*, 405 U.S. 538 (1972); *Carter* vs. *Stanton*, 405 U.S. 669 (1972); cf. *England* vs. *Louisiana State Bd. of Med. Exam.*, 375 U.S. 411, 413 (f.n.) (1964); *Government and Civic Employees, etc.* vs. *Windsor*, 347 U.S. 901 (1954), affirming 116 F. Supp. 354 (N.D. Ala., 1953); *Turner* vs. *City of Memphis*, 369 U.S. 350 (1962); *Stratton* vs. *St. Louis Southwestern R. Co.*, 282 U.S. 10 (1930).

STATUTORY PROVISIONS AND ADMINISTRATIVE RULES INVOLVED

The statute of the Commonwealth of Puerto Rico, the constitutionality of which is involved herein, is Act No. 45 of July 1, 1935, 11 Laws of Puerto Rico Annotated ("L.P.R.A.") §§ 1-140. The portions involved in this case are set forth in the Appendix, *infra*, pp. 19a-33a.

The pertinent regulations issued pursuant to the aforementioned statute are found at 11 Rules and Regulations of Puerto Rico ("R.R.P.R.") §§ 2a-1 to 75-1, set forth in the Appendix, *infra*, pp. 34a-36a.

QUESTIONS PRESENTED ON APPEAL

The District Court determined that ". . . the law in question does not involve a summary seizure of the premiums, although the duress with which payment is exacted might be said to provide some analogy . . ." for which reason ". . . this case comes within the express exceptions sketched in Part VI of *Fuentes* . . ." (Appendix, *infra*, p. 4a).

The questions presented are:

A. Whether the District Court erred in denying plaintiffs' request for declaratory and injunctive relief against appellee to enjoin said appellee from enforcing the statute challenged herein on grounds of its unconstitutionality under the following circumstances:

i. The challenged statute is of mandatory application to all appellants.

ii. Under the procedure for collection of contested premiums provided by the statute, the appellants must

deposit and pay the total amounts claimed by the appellee as a jurisdictional pre-requisite to initiate the administrative procedure before the Industrial Commission of Puerto Rico, which is the reviewing board for appellee's decisions.

iii. Failure to deposit the contested amounts entails serious and potentially fatal consequences for the appellants as a result of a non-insured status determination:

a. criminal sanctions (Appendix, *infra*, pp. 21a-23a).

b. civil liabilities

c. judicial paralization of their operations (Appendix, *infra*, pp. 21a, 22a).

iv. The statute does not contemplate the posting of a bond in lieu of the contested premiums;

v. The Act does not provide for the payment of interest on said amounts, should they be paid but thereafter found not to be due;

vi. The Act does not provide for the refund to the appellants of excess payments;

vii. The courts of the Commonwealth of Puerto Rico may not enjoin the collection of the contested premiums while the matter is under review.

viii. The statute establishes a summary embargo procedure whereby appellee is empowered to place a lien upon appellant's property for failure to pay contested premiums, which procedure does not provide for notice nor hearing prior to the lien (Appendix, *infra*, p. 27a).

B. Whether the District Court erred in forcing the appellants to purse the same unsound, unsatisfactory and questionable procedure they are challenging on the basis of lack of procedural due process under the Constitution of the United States and 42 U.S.C. § 1983, notwithstanding the testimony of the appellee's witness to the effect that the State Insurance Fund would spend the monies collected and a serious problem would be raised if it had to refund premiums collected but, eventually deemed not due, thus making said procedure a hollow remedy for appellants.

C. Whether the District Court erred in equating the collection of insurance premiums with the collection of taxes and thus subject to the *Fuentes* vs. *Shevin* exception, 407 U.S. at 92, n.24, notwithstanding the clear holding of the Supreme Court of Puerto Rico in *Wirshing* vs. *Buscaglia,* (1945) 64 P.R.R. 346, and the decision of the Industrial Commission (Appendix, *infra*, pp. 37a-79a, 59a); *Lombardi* vs. *Tauro*, 479 F.2d 798 (1st Cir. 1972).

D. Whether the District Court erred in ignoring the case of *Alcoa Steamship Company* vs. *Pérez,* (1st Cir. 1970) 424 F.2d 433, 435, wherein it was determined that the absence of any hearing prior to the taking of premiums and the absence of an adequate post-termination hearing except under duress raised substantial procedural due process questions under the Fifth and Fourteenth Amendments of the Constitution of the United States.

E. Whether the District Court erred in equating the procedural hearing prior to the payment of the contested premiums with a hearing on the merits, thus

circumventing the principal constitutional challenge raised by appellees.

F. Whether the District Court erred in its determination that it never had under consideration the question of whether an employer can be declared non-insured for failure to pay retroactive premiums.

G. Whether the District Court erred in concluding that there was evidence of the State Insurance Fund's fiscal problems, when such evidence consisted in a self-serving exhibit to one of appellee's memoranda and which is in contradiction with the conclusions arrived at by the Industrial Commission of Puerto Rico.[1]

H. Whether the District Court abused its discretion by denying the injunctive relief sought. *Mayo* vs. *Lakeland Highlands Canning Co.* (1940) 409 U.S. 310.

STATEMENT OF THE CASE

Appellants, Coca-Cola Bottling Co. of P.R., Inc., Sears Roebuck de Puerto Rico, Inc., Pan American World Airways, Inc., and Vistamar Motors, S.A., are employers subject to the provisions of the Workmen's Accident Compensation Act, Title 11 of the Puerto Rico statutes. The appellee is the Manager of the State Insurance Fund of Puerto Rico, and as such is in charge, *inter alia*, of the assessment and collection of workmen's compensation premiums from appellants and all other employers in Puerto Rico subject to the mandatory provisions of said Act.

On May 16, 1973, appellants filed their application for interlocutory and permanent injunction and for

[1] Appendix, *infra*, p. 59a.

the designation of a three-judge court, seeking to enjoin the governmental authorities from declaring them uninsured employers until final determination as to whether the contested premiums are due and from taking any other action which the Act permits against uninsured employers. Appellants further sought declaratory relief to the effect that the provisions of the Puerto Rico Workmen's Compensation Act for contesting premiums deny appellants due process of law, constitute a deprivation of appellants' civil rights and are unconstitutional under the 5th and 14th Amendments of the Constitution of the United States. In order to contest any premiums allegedly due, and in order to retain their status as insured employers under the Act, appellants must deposit the contested funds with the Manager of the State Insurance Fund, upon notice that the premiums are due (Title 11 L.P.R.A. § 25(2), Appendix, *infra*, p. 24a).

The Act nowhere provides for the posting of a bond *in lieu* of the contested amounts, nor for the payment of interest on the contested amount of premiums, should it be eventually deemed not due. The Act prohibits the Courts of the Commonwealth of Puerto Rico from enjoining the collection of said premiums while the case is under review (Appendix *infra*, p. 24a).

Should it be subsequently determined that the contested amounts paid were not due, said amounts may not be returned to plaintiffs, but rather constitute a credit toward future premiums (Appendix, *infra*, p. 29a).

Failure to pay the premiums assessed would result in a termination of the appellants' insured status, with consequent potential criminal and civil action by

the government and injured employees (Appendix, *infra*, p. 23a).

On May 30, 1974, the District Court (Pesquera, J.) granted a permanent injunction prohibiting appellee from declaring appellants uninsured for failure to pay contested premiums for the current years (Appendix, *infra*, pp. 15a-18a).

On July 1, 1974, Judge Pesquera issued a temporary restraining order against appellee in addition to the restraints set forth in the permanent injunction, prohibiting him from declaring any member of the class an uninsured employer for failing to pay any alleged deficiency of premium payments for the year 1973-1974 or any year prior thereto (Appendix, *infra*, pp. 9a-14a).

By Order of June 5, 1975, a three-judge court was convened. The parties waived their rights to an evidentiary hearing before the three-judge court and submitted the case based on the record and memoranda.

On December 27, 1976, the District Court issued a judgment and opinion thereby denying appellants' "constitutional challenges in this case arising from disputes concerning premiums charged by the Manager of the State Insurance Fund" (Appendix, *infra*, p. 2a). The Court further stated that "the collections here resemble nothing so much as the collection of taxes, for which *Fuentes* makes an explicit exception." Additionally, the Court stated that "plaintiffs' interest does not appear to us preponderate" (Appendix, *infra*, p. 6a).

On January 7, 1977, appellants filed a motion pursuant to Rule 59(e) of the Federal Rules of Civil

Procedure requesting a reconsideration of the District Court's ruling that the workmen's compensation premiums resemble taxes, notwithstanding the clear holding of *Wirshing* v. *Buscaglia,* 64 P.R.R. 346 (1945), and the specific finding of the Industrial Commission of Puerto Rico (Appendix, *infra*, p. 78a).[2] On February 8, 1977, the District Court denied appellants' motion stating that it had "simply held that the governmental interest in collecting these premiums is identical to that in collecting taxes, and, for this reason, the *Fuentes* exception applies" (Appendix, *infra*, p. 1a).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The decision of the District Court raises substantial questions respecting the propriety of equating governmental interest in the collection of workmen's compensation insurance premiums to that in collecting taxes, for which *Fuentes* vs. *Shevin, supra,* makes an express exception, thus depriving appellants of an injunction to avert criminal and civil sanctions. By stating that ". . . the exposure to sanctions is not a result of the operation of the contested provision, but of plaintiffs' refusal to abide by it . . ." (Appendix, *infra*, p. 3) and suggesting that an adequate remedy at law would be to raise the defense of the unconstitutionality of the statute in a suit brought against them, the District Court circumvents the main issues raised by the appellants that the administrative procedure utilized for collection of contested premiums constitutes a denial of due process guaranteed by the 5th and 14th amendments to the Constitution of

[2] Overruled on other grounds.

the United States when it suggests that appellants seek their remedy from the Commonwealth courts (Appendix, *infra*, p. 1a). This is clearly an error inasmuch as the statute involved is clear on its face and the government so admits. Appellants should not be required to utilize the procedure involved in the statute in order to question it.

It is well settled that even a temporary, non-final deprivation of property is nonetheless a "deprivation" in the terms of the 14th Amendment, (*Fuentes* vs. *Shevin*, 407 U.S. at p. 85) and the right to be heard does not depend upon an advance showing that one will surely prevail at the hearing, 407 U.S. at p. 87. The extraordinary situations that justify postponing notice and opportunity for a hearing, must be truly unusual, 407 U.S. at p. 90, and cases cited therein. The limited situations in which this Court has allowed seizures without hearings have been, first, directly necessary to secure important governmental and general public interest; second, there has been a special need for very prompt action; and third, the State has kept strict control over its monopoly of legitimate force. 407 U.S. at pp. 90-91.

While the appellants are aware that this Court has allowed summary seizure of property to collect the internal revenue of the United States where it is essential that governmental needs be immediately satisfied, 407 U.S. at pp. 91-92, citing *Phillips* v. *Commissioner,* 283 U.S. 589 (1931), there is authority for the opposite proposition in *Laing* vs. *United States,* 423 U.S. 161 (1976).

The fact that the District Court equated the contested premiums with a tax is clearly a manifest abuse

of discretion in view of the clear holding of the Supreme Court of Puerto Rico in *Wirshing & Co.* vs. *Buscaglia, supra,* wherein, to the specific question of whether the premiums of workmen's compensation premiums are taxes, the Court expressly answered in the negative. The Industrial Commission of Puerto Rico has specifically found that workmen's compensation premiums are not taxes (Appendix, *infra*, p. 78a). The U.S. District Court simply had no power to ignore and contradict the law of the Commonwealth of Puerto Rico found by its Supreme Court in *Wirshing* vs. *Buscaglia* that the premiums are *not* taxes. Cf. 28 U.S.C. 1652; compare *Day & Zimmermann, Inc.* vs. *Challoner*, 423 U.S. 3 (1975). Furthermore, great deference should have been given to the local administrative interpretation by the Industrial Commission of Puerto Rico that the premiums are *not* taxes. *Youakim* vs. *Miller,* 425 U.S. 231 (1976); *Northern Indiana Public Service Company* vs. *Walton League,* 423 U.S. 12 (1975); *Fry* vs. *U.S.,* 421 U.S. 542 (1975); *Sarbe* vs. *Bustos,* 419 U.S. 65 (1974); *N.L.R.B.* vs. *Bell Aerospace Co.,* 416 U.S. 267 (1974). Further, the First Circuit has specifically ordered the State Insurance Fund to refund the premiums paid under protest under 13 L.P.R.A. § 101 (applicable to refund of sums improperly collected *other than* taxes). *Alcoa Steamship Co., Inc.* vs. *Pérez, supra,* at page 437.

There was no evidence indicating that the State Insurance Fund is experiencing fiscal problems. Nevertheless, the District Court stated there was "evidence of the Fund's fiscal problems." The so-called evidence was merely a self-serving report prepared by the Fund and annexed to one of its briefs which was not subject to scrutiny by the appellants. Said report was in clear

opposition to the administrative record made a part of the Court record, which showed the State Insurance Fund to have a reasonable surplus. (Appendix, *infra,* p. 59a).

The District Court further erred in forcing the appellants to utilize the same procedure for the recovery of contested premiums which the Court of Appeals for the First Circuit in *Alcoa Steamship Company* vs. *Pérez, supra,* found to be "peculiar", "unsatisfactory" and "(not) legally adequate". 424 F.2d at pp. 435, 436.

The "remedy" made available after the District Court's decision, if it can be called one, is a hollow remedy inasmuch as the State Insurance Fund admitted in Court that it would spend the monies paid as contested premiums by the appellants.

While recognizing that the Court is loath to upset the denial of an injunction, absent a clear showing of abuse of discretion, we suggest that there is such an abuse, approximating itself a denial of due process, namely, when expeditious exercise of the judicial power is granted and imposed upon this Court and "such inferior courts as Congress may from time to time ordain and establish". Article 3, § 1, U.S. Constitution. In this connection, the appellants invite this Court's attention, in particular, to the following circumstances:

(1)) The constitutional rights which appellants are seeking to protect are rights which the Court has repeatedly held to be fundamental, as shown above, pp. 2-3.

(2) The showing made in the Court below establishes the application of the questioned statute to appellants, its enforcement, and the likelihood of substantial injury to appellants for which there is no plain, adequate and complete remedy at law. *Toomer* vs. *Witsell,* 334 U.S. 385 (1948).

We think it equally plain that this case presents a question of substantial importance affecting the administration of justice in federal courts in their time-honored role as arbiters of the constitutional rights of litigants.

CONCLUSION

For the reasons stated, the questions presented by this appeal are susbtantial and of public importance. It is respectfully submitted that probable jurisdiction should be noted.

DONALD M. HALL
RAFAEL PEREZ-BACHS
McCONNELL VALDÉS KELLEY
SIFRE GRIGGS & RUIZ-SURIA
G. P. O. Box 4225
San Juan, Puerto Rico 00936
For Appellants

APPENDIX

INDEX TO THE APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 436-73

COCA COLA BOTTLING COMPANY OF PUERTO RICO, INC., et als., *Plaintiffs*

vs.

JOSE M. ALONSO GARCIA, Manager, State Insurance Fund of Puerto Rico, *Defendant*

Order on Petition for Rehearing

The Court has never had before it the question whether an employer can be declared noninsured for failing to pay retroactive premiums, and it neither attempted to decide that question nor made a decision on that question a predicate for its ruling under the federal constitution. Plainly, this is a question upon which the views of the Commonwealth courts will be authoritative. Accordingly, if plaintiffs believe they require a decision on this question, their remedy, if they have one, is in the Commonwealth courts.

Nor did the court decide that the premiums are taxes for purposes of Puerto Rican law or for any other purpose. We simply held that the governmental interest in collecting these premiums is identical to that in collecting taxes and, for this reason, the *Fuentes* exception applies.

The petition for rehearing is denied.

San Juan, Puerto Rico, February 8, 1977.

/s/ HERNÁN G. PESQUERA
Hernán G. Pesquera
U.S. District Judge

/s/ J. J. TORRUELLA
Juan R. Torruella
U.S. District Judge

/s/ FRANK M. COFFIN
Frank M. Coffin
Chief Judge
U.S. Court of Appeals
for the First Circuit

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

(Caption Omitted in Printing)

Judgment

This action having come for a final hearing before a three judge court, Judges Frank M. Coffin, Hernán G. Pesquera and Juan R. Torruella sitting, and the issues having been heard and an opinion having been duly rendered on this day, the Court hereby

ORDERS, ADJUDGES AND DECREES, that plaintiffs' constitutional challenges in this case arising from disputes concerning premiums charged by the Manager of the State Insurance Fund, are hereby denied; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiffs' complaint be and it is hereby dismissed.

San Juan, Puerto Rico, December 21, 1976.

/s/ FRANK M. COFFIN
Frank M. Coffin
Chief Judge
U.S. Court of Appeals
for the First Circuit

/s/ HERNÁN G. PESQUERA
Hernán G. Pesquera
U.S. District Judge

/s/ J. J. TORRUELLA
Juan R. Torruella
U.S. District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

(Caption Omitted in Printing)

Opinion

COFFIN, *Circuit Judge*. Plaintiffs are employers doing business in Puerto Rico and are subject to the Puerto Rico Workmen's Accident Compensation Act, Title 11 of the Puerto Rico statutes. They are currently involved in a number of disputes concerning premiums charged to them by defendant, the manager of the State Insurance Fund, which runs the workmen's compensation program.[1] In order to challenge these charges, it is necessary first to pay in the contested amounts. 11 L.P.R.A. § 25. Some of the plaintiffs have done this, and the disputes over the validity of the assessments are in various stages of litigation before the Puerto Rico Industrial Commission and on appeal to the Puerto Rico Supreme Court. The rest of the plaintiffs have refused to pay the contested money, for which failure the statute provides possible criminal sanctions as well as exposure to civil liability for employee accidents while the employer is in uninsured status. 11 L.P.R.A. §§ 16, 18. All the plaintiffs claim that the collection of premiums under such duress prior to any hearing is unconstitutional.

Plaintiffs argue that one element of irreparable harm which they need an injunction to avert consists of the possible application of the criminal and civil sanctions provided by the statute for failure to pay the contested premiums. We reject this argument. The exposure to sanctions is not a result of the operation of the contested provision, but of plaintiffs' refusal to abide by it. Perhaps

---

[1] The disputes concern the retroactive elimination of a previously imposed annual salary limitation on the assessment of premiums, retroactive reclassifications, and the inclusion of certain employer fringe benefits in the amount subject to assessment.

those plaintiffs would have an adequate remedy at law to protect them from the sanctions, *viz.*, raising the defense of the unconstitutionality of the statute in a suit brought against them. In any event, in assessing the law's constitutionality, we are concerned only with the harm which may result from following it. That harm is alleged to be the deprivation of property without a prior hearing, under *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), and similar cases.

The law in question does not involve a summary seizure of the premiums, although the duress with which payment is exacted might be said to provide some analogy. Even so, the seizure cases cited by appellant are fundamentally distinct from this case. Each of them concerned a dispute between private parties in which ex parte allegations by one side sufficed to invoke state machinery. *See Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969) (garnishment); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) (replevin); *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975) (garnishment); *see also Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974) (sequestration). Here, it is a governmental agency which assesses the premiums, and its purpose is a public one. As such, this case comes within the express exceptions sketched in part VI of *Fuentes*, *supra*, 407 U.S. at 90-93. The tests enunciated there have been met: an important governmental or public interest is being served—the maintenance of the integrity and cash flow of the fund (there was evidence of the fund's fiscal problems); the very nature of the governmental interest requires relatively prompt action (although not so lacking in warning and other formalities as summary seizure); and the state has kept strict control over its monopoly of legitimate force (an arm of the government being the assessor). Indeed, the collections here resemble nothing so much as the collection of taxes, for which *Fuentes* makes an explicit exception, *see* 407 U.S. at 92, n. 24. We think this case comes within the "usual rule" that "[w]here only property rights are involved, mere postponement of judi-

cial enquiry is not a denial of due process, if the opportunity for ultimate judicial determination of liability is adequate." *Mitchell, supra*, 416 U.S. at 611, quoting *Phillips* v. *Commissioner*, 283 U.S. 589 (1931); *see also Ewing* v. *Mytinger & Casselberry*, 339 U.S. 594, 599 (1950); *Bull* v. *United States*, 295 U.S. 247 (1935). Whatever effect *North Georgia* has upon *Mitchell*, we do not take it to undermine part VI of *Fuentes*.

This is not to deny that "[p]rocedural due process imposes constraints on governmental decisions which [work a deprivation of] 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment", *Mathews* v. *Eldridge*, No. 74-204 (Supreme Court, Feb. 24, 1976), slip op. at 10; and there can be no doubt that some kind of hearing is required before plaintiffs are finally deprived of the contested amounts. But *Eldridge* further instructs us that in evaluating a claim to a predeprivation hearing we must consider what kind of hearing would be appropriate, and analyze the governmental and private interests affected. *See also* Friendly, *Some Kind of Hearing*, 123 U. Pa .L. Rev. 1267 (1975); Davis, Administrative Law of the Seventies, ch. 7 (1976).

With respect to the appropriate form of hearing, the present case differs fundamentally from *Eldridge* and its predecessors, each of which involved the possibility of hearings on relatively straightforward factual questions (Was the credit installment paid? Was the eligibility requirement satisfied?) susceptible to relatively swift and reliable interim determination at a more or less abbreviated proceeding. The questions at issue in the underlying dispute here are both complex and predominantly legal rather than factual (Was the defendant authorized to assess retroactively at a higher salary level? Was the elimination of the ceiling tantamount to a change in rates, necessitating a compensating rate reduction?). They implicate the agency's interpretation of Puerto Rico law affecting all employers (not to mention the fiscal integrity of the fund),

rather than a routine decision made daily in individual cases. We would not expect that such rule-making questions could be answered satisfactorily at anything less than a full scale adversary encounter, and indeed, plaintiffs appear to contemplate no less than a full hearing on the merits, including an appeal to the Puerto Rico Supreme Court, prior to payment. We agree that the nature of the inquiry makes an abbreviated hearing inappropriate even for an interim decision.

A full hearing, postpayment, is provided before the Industrial Commission, and it appears to be a slow process. In our analysis of the private and governmental interests at stake relative to whether this hearing must precede payment, plaintiffs' interest does not appear to us to preponderate. If we are correct in the application of part VI of *Fuentes*, it follows that the importance of prompt collection to the soundness of the fund during this extended period of contest will be very weighty. On the private side of the balance is the fact of loss, without more, of the interim use of the funds. At least in the absence of any evidence of impending fiscal disaster, this claim is insufficient. "Only in *Goldberg* has the Court held that due process requires an evidentiary hearing prior to a temporary deprivation. It was emphasized there that welfare assistance is given to persons on the very margin of subsistence." *Eldridge*, *supra*, slip op. at 18. While there is always the risk that the defendant's rulings will be overturned by the Puerto Rico reviewing authorities, there is no showing of bad faith or discrimination. We cannot say that the constitution imposes a general requirement that the payment of premiums must await the full-scale and administrative judicial review which is required to satisfactorily resolve an underlying dispute of the nature involved in this case.

Plaintiffs further allege that in the event of a favorable decision in the Puerto Rico system following prepayment,

any refund will not include accumulated interest.[2] We do not weigh this in the *Eldridge* balance because it is not the type of harm which only a prepayment hearing can prevent.[3] *See Eldridge*, *supra*, slip op. at 9. To the extent that a failure to return interest may constitute a separate constitutional violation,[4] plaintiffs would appear to have

---

[2] The accuracy of this allegation is not certain. The parties are in heated dispute over whether § 25(3), relating to reduction of rates, or § 27, relating to adjustment of premiums, applies to their various controversies. The former does not mention interest, while the latter appears to specifically preclude it. Both provide for possible credit against future payments in lieu of refund, but this provision would appear tantamount here only to a possible loss of future interest, in contrast to the threatened complete loss in *Alcoa Steamship Co.* v. *Perez*, 424 F.2d 433 (1st Cir. 1970), where the contest was over jurisdiction and some of the employers ceased doing business in Puerto Rico. Moreover, yet another statute, 13 L.P.R.A. §§ 101, 102, authorizes refunds of illegally collected amounts other than taxes, with interest, and presumably should be read in conjunction with the above provisions. *See Alcoa*, *supra*, 424 F.2d at 437. In short, there is room for interpretation of the statutory scheme.

[3] We do not take plaintiffs to seek an injunction directly on the basis that no interest will be returned. While we may consider the *Fuentes-Eldridge* claim irrespective of the merits, because the due process rights implicated therein are independnt of the outcome of the specific underlying dispute, a claim to return of interest must be based on a determination that the premiums were not legally assessed. That question has not been presented or argued here, being reserved for the normal reviewing process in Puerto Rico forums. An injunction at this stage on this ground would be premature both because plaintiffs may lose on the merits, thereby eliminating any claim to interest, and because even if they win on the merits it appears entirely possible that interest will be granted to them, *see* note 2 *supra*.

[4] This would appear to be a difficult question. *Cf. United States* v. *Livingston*, 179 F. Supp. 9, 15 (E.D. S.C. 1959), *aff'd*, 364 U.S. 281 (1960); *id.*, 179 F. Supp. at 24 (dissenting opinion, with discussion); *Board of Commissioners* v *United States*, 308 U.S. 343 (1939).

adequate remedy if their claim ripens.[5]

Plaintiffs' requests for relief are denied.

/s/ FRANK M. COFFIN
Circuit Judge
U.S. Court of Appeals
for the First Circuit

/s/ HERNÁN G. PESQUERA
District Judge,
U.S. District Court for the
District of Puerto Rico

/s/ J. R. TORRUELLA
U.S. District Court for the
District of Puerto Rico

Dated at

[5] That is, plaintiffs will have standing to sue for interest if, having paid in the contested amounts, they win their case (that the premiums were illegally assessed) before the Commonwealth and they are not reimbursed for interest. (Or presumably they could raise the issue contingently in the current Commonwealth review proceedings.) In the event that the difficult question of state law, *see* note 2 *supra*, is then resolved against them, and the sensitive constitutional question, *see* note 4 *supra*, is resolved in their favor, a thorny problem of sovereign immunity could be presented. However, we note that this is not an area where the doctrine of soverign immunity has been applied most strictly, *see* Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1 28-29 (1963). And the premiums were paid under duress, *see Alcoa*, *supra* note 2. The fact that they were paid to an agency, and are kept in a separate fund from which any interest would come, *see* 13 L.P.R.A. § 102, albeit within the Treasury, might be helpful. *See Alcoa*, *supra* note 2, at 437; *National Volunteer Home* v. *Parrish*, 229 U.S. 494, 496 (1913); *see generally Edelman* v. *Jordan*, 415 U.S. 651 (1974). Also, the defendant might not choose to insist on sovereign immunity lest such insistence insure the issuance of injunctions in future disputes because of an inadequate legal remedy for recovery of interest. Finally, even if sovereign immunity were to apply and not be waived, there still might be a form of relief available in the form of an injunction to prevent the defendant from declaring plaintiffs uninsured and from imposing sanctions for plaintiff's deducting from future premium payments the amount of the lost interest incurred in the current dispute. Such a remedy would arguably not be barred by sovereign immunity because it would not actually order the state to pay out any money. *See Larson* v. *Domestic & Foreign Service Corp.*, 337 U.S. 682, 691 n. 11 (1949); *Pennoyer* v. *McConnaughy*, 140 U.S. 1, 16 (1891).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

(Caption Omitted in Printing)

Temporary Restraining Order

Upon reading the amended complaint, the applicable sections of 11 L.P.R.A. § 1 et seq. being the Workmen's Accident Compensation Act of Puerto Rico (the "Act") and after examining the affidavit and notification of the uninsured status of Pan American World Airways, Inc. and Vistamar Motors, S.A., and the accompanying affidavit and notification of embargo and the motion for further relief of Coca Cola Bottling Co. of Puerto Rico, Inc. all of whom are employers under the meaning of the Act, this Court finds irreparable damage to said plaintiffs as follows:

1. Plaintiffs are subject to the provisions of the Act and it is mandatory that Plaintiffs maintain coverage 11 L.P.R.A. § 19.

2. Plaintiff Pan American World Airways, Inc. has been notified by the State Insurance Fund of Puerto Rico that it is an uninsured employer within the meaning of the Act for failure to pay contested premiums for salaries in excess of $5,200 for the current year 1973-1974.

3. Plaintiff Vistamar Motors, S.A. has been notified by the State Insurance Fund of Puerto Rico that it is

an uninsured employer within the meaning of the Act for failure to pay $4,837.56 in contested premiums for salaries in excess of $5,200 for the current year 1973-1974.

4. Plaintiff Coca Cola Bottling Co. of Puerto Rico, Inc., has received a notification of embargo for failure to pay premiums on contributions to a retirement or pension plan, health and medical plans, uniforms and other fringe benefits for the prior years of 1965-1966, 1966-1967, 1967-1968, without benefit of a hearing.

5. Plaintiff Coca Bottling Co. of Puerto Rico, Inc. has been warned by the defendant manager José M. Alonso García, through the deficiency notices sent Plaintiff that said Plaintiff may be declared an uninsured employer within the meaning of the Workmen's Accident Compensation Act of Puerto Rico by cancelling the employer's policy.

6. Such declaration of an uninsured status for the current year 1973-1974 as regards Plaintiffs Pan American World Airways, Inc. and Vistamar Motors, S.A. has exposed them to claims for accidents without a preterminate or a post-termination hearing, and may thereby deny them due process.

7. Such notification of embargo of property of the Plaintiff Coca Cola Bottling Co. of Puerto Rico, Inc. was made without a preterminate hearing, and threatens an undue interference with the business activities of this plaintiff, and further may constitute a denial of procedural due process.

8. The failure of Plaintiffs to pay premiums for salaries in excess of $5,200 for the current year 1973-1974 or the failure to pay disputed premiums for prior years for contributions to pension plans, welfare and health plans, or for providing uniforms or other fringe benefit constitutes a criminal offense 11 L.P.R.A. § 13.

9. The Act permits the manager of the State Insurance Fund to seek judicial paralyzation of Plaintiffs business activities because of having been declared uninsured employers within the meaning of the Act, 11 L.P.R.A. § 2(2).

10. Plaintiffs Pan American World Airways, Inc. and Vistamar Motors, S.A. notwithstanding their having filed a petition for review with the Industrial Commission on the contested premiums for the current year 1973-1974 have been declared uninsured employers.

11. Plaintiff Coca Cola Bottling Co. of Puerto Rico, Inc. have been sent a notification of embargo, notwithstanding its having filed a petition for review with the Industrial Commission on the contested premiums for the contributions to the union welfare plan, health and medical plans, uniforms and other fringe benefits for the prior years of 1965-1966, 1966-1967, 1967-1968.

12. In order to contest any premiums allegedly due for the current year 1973-1974 and to be reinstated for the current year, Plaintiffs Pan American World Airways, Inc. and Vistamar Motors, S.A. must deposit the contested funds with the manager of the State Insurance Fund.

13. In order to lift the embargo placed against its property for failure to pay contested premiums for prior years, Plaintiff Coca Cola Bottling Co. of Puerto Rico, Inc. must deposit the contested funds with the manager of the State Insurance Fund.

14. The Act does not provide for the posting of a bond in lieu of the contested amount of premiums due for the current year 1973-1974 nor for contested premiums of prior years.

15. The Act does not provide for the payment of interest on the contested amount of premiums due for the current year 1973-1974 or for payment of interest on contested premiums for prior years if these are deposited

in order to regain an insured status, or lift an embargo on property of an employer.

16. Plaintiff Pan American World Airways, Inc. has paid the amount of $43,285.32 for the current year 1973-1974, but nevertheless has been declared an uninsured employer since the beginning of the current year, that is, July 1, 1973.

17. Plaintiff Vistamar Motors, S.A. has paid the amount of $6,993.35 for premiums for the current year 1973-1974 but has nevertheless been declared an uninsured employer since the beginning of the current year, that is, since July 1, 1973.

18. Plaintiff Coca Cola Bottling Co. of Puerto Rico, Inc. has paid the amount of $63,298.83 for the year 1965-1966, $67,445.24 for the year 1966-1967, and $77,619.25 for the year 1967-1968, but has nevertheless been notified of an embargo against its property for contested premiums for the same prior years.

19. The Act provides that should it be subsequently determined that the contested amounts for current year premiums should not be due, said amounts may not be returned to Plaintiffs but rather constitute a credit toward future premiums, 11 L.P.R.A. § 25(3).

20. Injunctive relief is not available in the Courts of the Commonwealth of Puerto Rico 32 L.P.R.A. § 3524.

21. The parties on June 27, 1974 by stipulation agreed to extend the duration of this temporary restraining order and to enlarge its provisions sufficiently to include the embargo and attachment proceedings of the Defendant Manager.

In view of the above findings, conclusions and stipulations, it is

ORDERED

1. That Defendant José Alonso, Manager of the State Insurance Fund of Puerto Rico, his agents, successors, deputies, subordinates, servants and employees, and all persons acting by, through or under him or through his order, be, and they are hereby restrained from taking any action or proceeding or making threats to take any action or proceeding to declare Plaintiffs, including any member of the class, uninsured employers because of Plaintiffs failure to deposit any contested amounts with the State Insurance Fund, for the current year of 1973-1974 or for premiums allegedly due for fringe benefits for prior years or current years.

2. That Plaintiff Pan American World Airways, Inc., Vistamar Motors, S.A., or any other plaintiff or member of the class shall not be denied their status as insured employers for failure to pay premiums on salaries in excess of $5,200 for the current year 1973-1974 or for failure to pay premiums on fringe benefits considered as wages, for prior years or for current years.

3. That Defendant José Alonso, Manager of the State Insurance Fund of Puerto Rico, his agents, successors, deputies, subordinates, servants and employees, and all persons acting by, through or under him or through his order, be, and they are hereby restrained from taking any action or proceeding or making threats to take any action or proceeding to embargo property of the Plaintiff, including any member of the class, because of Plaintiff's failure to deposit any contested amounts with the State Insurance Fund for prior years or for current years.

4. That Plaintiff Coca Cola Bottling Co. of Puerto Rico, Inc. or any other plaintiff or member of the class shall not be denied their status as insured employers for failure to pay contested premiums on fringe benefits for prior years or for the current year or future current years.

5. The terms of this temporary restraining order in no way prevents any party from raising any defense, including jurisdiction, before the Courts of Puerto Rico with respect to any action for monies allegedly due the State Insurance Fund by any Plaintiff, including any member of the class for prior years or for the current year.

6. That this Order be effective from July 1, 1974 and shall expire by its terms on July 19, 1974 unless within the time so fixed it is extended or the party against whom this Order is directed consents that it may be extended for a longer period. This temporary restraint is on condition that the bonds filed by Plaintiffs Pan American World Airways and Vistamar Motors, S.A. in the amounts of $20,000 and $5,000 respectively, shall be continued. It is further

ORDERED that the permanent injunction ordered by this Court on May 30, 1974 in this case shall continue in effect unaltered and in its entirety, and this temporary restraining order is in addition to the restraints set forth in the permanent injunction.

ISSUED at San Juan, Puerto Rico, this 1st day of July, 1974.

/s/ HERNÁN G. PESQUERA
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

(Caption Omitted in Printing)

Permanent Injunction

Upon reading the complaint herein, the applicable sections of 11 LPRA § 1 et seq (Workmen's Accident Compensation Act of Puerto Rico (the Act), and after hearing the parties in oral argument in connection with plaintiffs' request for injunctive relief, and after hearing defendant's contention that the claims for money due hereinafter set forth are not subject to the provisions of 11 LPRA § 1 et seq, the Court specifically finds irreparable damage to said plaintiffs as follows:

1. Plaintiffs are subject to the provisions of said Workmen's Accident Compensation Act and it is mandatory that plaintiffs maintain coverage, 11 LPRA Section 19.

2. Plaintiff Coca Cola Bottling Co. of Puerto Rico, Inc. has been notified by the State Insurance Fund of Puerto Rico of alleged deficiencies in the amount of $94,444.28 covering the years 1965-1966 to 1970-1971.

3. Plaintiff Sears Roebuck de Puerto Rico, Inc. has been notified by the State Insurance Fund of Puerto Rico of alleged deficiencies in the amount of $226,449.08 covering the year 1967-1968 to 1970-1971.

4. Other intervening claimants are in similar position as the above mentioned plaintiffs.

5. The failure of plaintiffs to pay premiums when due under the Act is a criminal offense, 11 LPRA § 18.

6. The Act permits the Manager of the State Insurance Fund to seek judicial paralization of plaintiffs' operations for failure to be properly insured pursuant to the terms of the Act, 11 LPRA § 2(s).

7. The failure of plaintiffs to pay premiums when due would expose plaintiffs to substantial civil liabilities to injured employees, 11 LPRA § 16.

8. In order to contest any premiums allegedly due, plaintiffs, in order to retain their status as insured employers under the Act, must deposit the contested funds with the Manager of the State Insurance Fund, upon notice that the premiums are due. 11 LPRA § 25(2).

9. The Act does not provide for the posting of a bond in lieu of the contested amount of premiums.

10. The Act does not provide for the payment of interest on the contested amount of premiums, should it eventually be deemed not due.

11. The Act prohibits the courts of the Commonwealth of Puerto Rico from enjoining the collection of said premiums while the case is under review, 11 LPRA § 25(2).

12. The Act provides that should it be subsequently determined that the contested amounts paid were not due, said amounts may not be returned to plaintiffs, but rather constitute a credit toward future premiums, 11 LPRA § 25(3).

13. That plaintiffs have the choice of either paying the contested premiums or being declared an uninsured employer.

14. That injunctive relief is not available in the courts of the Commonwealth of Puerto Rico, 32 LPRA § 3524.

15. Defendants allege that with respect to monies claimed for years prior to the current year the procedure for collection of unpaid premiums and the consequences of failure to pay heretofore set forth are inapplicable.

16. Defendants allege their intention to seek to recover amounts allegedly due for any year prior to the current

year via the ordinary procedure for collecting debts in the courts of Puerto Rico, and that the utilization of said procedure will not cause plaintiffs to be declared uninsured employers nor will it produce any of the consequences of being declared an uninsured employer.

17. Said contention by defendants is not clear from a reading of 11 LPRA § 1 et seq, and plaintiffs may still nevertheless be subject to the hazards set forth heretofore.

Now Therefore, upon motion of said plaintiffs Coca Cola Bottling Co. of Puerto Rico, Inc. and Sears Roebuck de Puerto Rico, Inc., on their behalf and on behalf of all other intervening plaintiffs and employers similarly situated, pursuant to Rule 23 of the Federal Rules of Civil Procedure, it is Ordered:

1. That defendant José Alonso, Manager of the State Insurance Fund of Puerto Rico, his agents, successors, deputies, subordinates, servants and employees, and all pesrons acting by, through or under him or through his order, be, and they are hereby permanently restrained from taking any action or proceeding or making threats to take any action or proceeding to declare plaintiffs, including any member of the class, uninsured employers because of plaintiffs' failure to deposit any contested amounts for premiums not paid on salaries in excess of $5,200.00 per year, hereinafter referred to as excess premiums, for the year 1972-1973 or any year prior thereto.

2. Defendant José Alonso is hereby ordered to deliver a copy of this Permanent Injunction with each excess premium deficiency invoice hereinafter served upon any member of the class as described in the complaint, for the year 1972-1973 or any year prior thereto.

3. The terms of this Permanent Injunction are specifically made inapplicable to any claim presented by the State Insurance Fund of Puerto Rico to any plaintiff, in-

cluding any member of the class, for the current year 1973-1974 or for any future current year.

4. The terms of this Permanent Injunction in no way prevent defendant from initiating any judicial action to collect any monies allegedly due the State Insurance Fund by any plaintiff, including any member of the class for the year 1972-1973 or any year prior thereto nor any party from raising any defense to such action.

5. On July 1, 1974, for the purposes of this injunction, any claim for excess premiums for the year 1973-1974, shall become subject to the terms of this Permanent Injunction, and on each July 1 thereafter, each year subsequent to 1973-1974 shall become subject to the terms of this injunction.

6. This Permanent Injunction, upon taking effect, shall supplant the temporary restraining order stipulated by the parties in open Court on May 30, 1973.

7. Because this Permanent Injunction is inapplicable to any claim by the State Insurance Fund for the current year 1973-1974 or for any future current year, this Court specifically retains jurisdiction over plaintiffs' complaint in this matter, unless and until notified by the parties that all matters raised by this complaint have been satisfactorily resolved, provided nevertheless that this Court on its own motion, or, upon the motion of any party, and for good cause shown, may at any time order further hearings on this matter to determine its status.

8. No bond requirements are set at this time.

San Juan, Puerto Rico, on this 30th day of May, 1974.

/s/ Hernán G. Pesquera
United States District Judge

Act No. 45 (Approved April 18, 1935)

Statement of Motives

An act to promote the welfare of the inhabitants of The People of Puerto Rico in or regarding accidents causing death or injuries, or diseases or death caused by the occupation of the workmen in the course of their employment; to establish the duty of employers to compensate their workmen or the beneficiaries of the latter as defined in this Act, for sickness or death caused by the occupation, or for injuries or death independent of negligence, and to provide the means and methods for making this duty effective; to establish the form of insurance and to regulate the same; to continue state insurance as an exclusive form; to create an Industrial Commission; to determine its powers and duties; to create the Office of Manager of the State Insurance Fund, and to define the powers and duties of said Manager; to empower the Manager to extend the medical and hospital benefits of the workmen's accident insurance to employers working regularly at the manual labor on their farms, shops or small business; to establish the liability of the people of Puerto Rico and of its Municipalities in regard to their employees and workmen, for disease or death caused by their occupation or for their injury or death in all public services and in works done by force account; to authorize the Industrial Commission to liquidate all such claims as may be pending in accordance with Act No. 85 of May 14, 1928, as subsequently amended, with the exceptions of the provisions of Sections 40 to 47 both inclusive, of this Act, in regard to the decision and liquidation of the cases pending under said Act, and for other purposes.

Section 1—Short Title

This Act shall be known as the "Workmen's Accident Compensation Act."

* * *

§ 2. Workmen and employees covered by chapter

The provisions of this chapter shall be applicable to all such workmen and employees working for the employers to whom the following paragraph refers, as suffer injury, are disabled or lose their lives by reason of accidents caused by any act or function inherent in their work or employment, when such accidents happen in the course of said work or employment, and as a consequence thereof; or such as suffer disease or death caused by the occupations specified in the following section. Workmen and employees whose work is of an accidental or casual nature and is not included in the business, industry, profession, or occupation of their employer and also such persons as work in their homes, are expressly excepted.

This chapter, being of a remedial character, shall be construed liberally, and any reasonable doubt that may arise as to its application with regard to the existence of causal relation between the work or occupation of the workman or employee and the injury, disability or death, or the occupational character of a sickness, shall be decided in favor of the workman or employee, or his beneficiaries.

This chapter shall be applicable to all employers employing one (1) or more workmen or employees covered herein, whatever their wages may be . . .

* * *

In any case where a farm, industrial or public-service employer uses employees, middlemen, adjusters or industrial partners to operate any farm product, merchandise or passenger transportation service, said employer shall

come under the provisions of this chapter and shall insure the workmen performing such transportation service, even when they are hired directly by the employees, middlemen, adjusters or industrial partners of such employer.

For the purposes of this chapter, industrial partners shall be considered employees unless the partnership to which they belong has been executed through public deed or instrument signed before a notary.

* * *

". . . . In the case of employer who fail to insure in accordance with the provisions of this chapter, the following procedure shall be observed:

(1) In the case of contractors or owners of private works, the Bureau of Permits shall not extend a permit for construction, structural alteration, enlargement, transfers or use of buildings until the employer has presented to the Director of the Bureau of Permits a certificate issued by the Manager accrediting that the work has been duly insured pursuant to law; Provided, further, That no officer or organization of the Commonwealth of Puerto Rico may supply lighting, or sewer or aqueduct services, or render any public service whatsoever, including health licenses issued by the Department of Health, for the construction, structural alteration, enlargement, transfer or use of buildings, both in the urban and rural zones, until shown authentic proof that the work has been insured according to law.

(2) When any employer is performing his activities or operations, of whatever nature they may be, without the corresponding insurance, the Manager, either personally or through his assistants, shall have power to suspend the same, utilizing therefor the services of any marshall of the courts of justice of Puerto Rico or the services of the Commonwealth Police, or of any agent of the Department of Labor or of the Treasury; and any such officer shall be in duty bound to carry out the orders of the Manager of the State Fund without excuse of any kind, and such suspension of work shall continue until the

employer has insured as provided in this chapter; and should the employer continue his activities or operations in spite of the prohibition of the Manager of the State Fund, complaint shall be immediately filed against him in a court of competent jurisdiction by any such officer upon whom his duty is imposed by this chapter, for disobedience to the order of the Manager and, upon conviction, he shall be punished by a fine or not less than fifty (50) dollars or by imprisonment in jail for a term of not less than fifteen (15) days, or both at the same time; Provided, That as soon as said complaint is filed, the court shall issue a restraining order preventing the continuance of the activities or operations of the employer until he has insured in accordance with this chapter.

• • •

§ 12. Review by Supreme Court

Any interested party may present certified copies of an order or decision of the Industrial Commission, in accordance with this chapter, against which a petition for review has been filed and a decision rendered thereon, a review of which before the Supreme Court of Puerto Rico may be requested within the term of fifteen (15) days after notification thereof; Provided, That said review may be granted only on questions of law, or upon appreciation of the evidence when such evidence is of an expert nature.

None of the parties shall incur costs of any kind in the prosecution of the remedies established by this chapter.

• • •

§ 16. Uninsured Employers

Should any employer covered by this chapter fail to insure the payment of compensation for labor accident in accordance with this chapter, any prejudiced workman or employee, or his beneficiaries, may proceed against such employer by filing a petition for compensation with the Industrial Commission, and may bring suit for damages against the employer, just as if this chapter were not applicable; and they shall be entitled in such action, without furnishing bond, to attach the property of the employer for such sum as the court may determine, in order to insure satisfaction of such judgment as may be rendered, provided the court considers there is good cause for action, after examining the claim, which shall be sworn to. Such attachment shall include attorney's fees to be fixed by the court, and shall be effective until the case has been decided and the amount of the judgment paid. If, as a result of such action for damages, judgment is rendered against the employer in excess of the compensation fixed by this chapter, the compensation fixed, if paid or guaranteed by surety approved by the court shall be deducted from the judgment.

§ 18. Penalty for Failure to Insure

Failure to insure payment of compensation as provided in section 19 of this title shall constitute a misdemeanor punishable by a fine of not less than twenty-five (25) dollars nor more than one thousand (1,000) dollars, or by imprisonment in jail for not less than fifteen (15) days nor more than six (6) months, or by both penalties; Provided, That in case of recividism both penalties shall be imposed; and failure to post the written or printed notice reciting the fact of being insured in the manner also provided in Section 19 of this title shall constitute a misdemeanor punishable by a maximum fine of five (5) dollars, or by imprisonment in jail for a period of not more than five (5) days, or by both penalties, in the discretion of the Court; Provided, That the complaint shall be filed by the Manager of the State Fund or his agents, by any agent of the Department of Labor or of the Treasury to whom the Manager may delegate, or by any peace officer, before the part of the District Court where the works of the employer were carried out, and in case the works of said employer should extend to more than one part, then before any of them.

• • •

§ 19. Compulsory Insurance

Every employer comprised under the provisions of this chapter shall be obliged to insure his workman or employees in the State Insurance Fund, the compensation they may receive for injury, disease or death; and he shall post in a conspicuous place a written or printed notice, clearly legible, announcing the fact that he is insured.

• • •

§ 25. Review of Rates.

The decision of the Manager, fixing and regulating the premium rates for each group of occupations or industries, and the rate classifications to govern each group or industry in particular, or any order increasing the premium rate for a certain employer, as provided in the preceding section, may be reviewed by the Industrial Commission of Puerto Rico in the following manner:

(1) Any regular or permanent employer aggrieved may file with the Industrial Commission of Puerto Rico, within a period of thirty (30) days after the new rates are promulgated, or any eventual or temporary employer, within the thirty (30) days following the obtaining of his policy, a petition for review by said Industrial Commission of Puerto Rico of the decisions rendered by the Manager in regard to rates or premiums for one or more occupations or industries giving the reasons why said rates or premiums should be amended; and the Manager shall be required to appear and answer said petition within a period of fifteen (15) days. The Commission shall give preference to the case over all other cases on the calendar, and shall proceed to render a final decision in accordance with such rules as said Commission may have promulgated.

(2) The review referred to in the foregoing paragraph shall in no way suspend the collection of the premium or the effects of any other provision of this chapter; nor shall the courts issue writs of injunction enjoining the collection of said premiums or taxes while the case is under review.

(3) In case the decision of the Commission is in the sense of reducing the rate or premium that the Manager has fixed for any class of occupation or industry, neither the Manager of the State Fund nor the Secretary of the Treasury shall, in any case be ordered to return the excess paid in premium or taxes, but such excess shall be deducted from the premiums or taxes to be collected in future from the employers filing the petitions.

(4) In case any classification is modified by an order or decree of the Commission, as herein provided, the Manager shall compute new rates, premiums, or taxes in the manner determined by the Commission for all such employers who have workmen or employees included in the classification or classifications objected to; Provided, That said rates, premiums or taxes shall govern to the end of the fiscal year to which said classification or classifications pertained.

In order to carry out the provisions of this section, the Manager of the State Fund shall, prior to June 1 of each year, hold public hearings in different towns of the Commonwealth, giving notice thereof to all insured employers so that they may appear and make any allegations they wish in regard to their right in connection with such grouping or occupations or industries.

This notice shall be published in two newspapers having the largest circulation in the Commonwealth.

The Manager of the State Insurance Fund is likewise authorized to collect individually from each employer in the same classification of occupations or industries, the percentage of premium which in his opinion may be just, granting a reduction in the basic rate, of the classification, or levying a surcharge on said basic rate, in accordance with the individual experience of the employer determined according to the provisions of this chapter and the regulations which from time to time the Manager may adopt, which when promulgated by the Governor shall have the force of law; Provided, That in no case shall the rate or rates of insurance of the employers be increased or

decreased by more than 30 per cent of the basic rate fixed for the general classification; and Provided, further, That the Manager shall notify each employer in advance of the levying of the premiums, percentage of the bonus or surcharge corresponding to him for the policy year. It shall be the duty of the Manager to furnish any employer who so requests all available information as to the factors which compose the individual experience and or the bonus to be paid or received by the employer requesting the information. In case of nonconformity, the employer may appeal to the Industrial Commission within the thirty (30) days following the date on which he was informed of the levying of the surcharge or bonus.

• • •

§ 26. Insurance Policies and Assessment and Collection of Premiums

Under no circumstances shall a policy be issued to cover only a part of the operations of an employer and leaving other activities uninsured. All of the operations of the employer shall be covered by one sole policy; Provided, That in case the employer, at the time of executing the policy, or of extending it, or of rendering his report on the wages paid, or of submitting his payroll return, fails to include part of his operations, thus preventing proper assessment for insurance purposes, the Manager, however, may at any time assess and levy, and collect from him, additional premiums on those operations which he has failed to include, in the same manner as if they had been insured. Policies shall be issued on the basis of the total payroll of the activities of the employer, as shown from his accounting books, payrolls, registers or other trustworthy documents. In case the employer is unable to produce accounting books, payrolls, registers, or other trustworthy documents, the total payroll shall, after the issuance of the policy or after the investigation of the employer, be computed on the basis of a reasonable estimate, according to the importance, nature and volume of business of the employer. New operations not covered by

the original policy shall be covered by notices subject to the approval of the Manager, or by extensions of policies.

The Manager of the State Insurance Fund is hereby authorized and empowered to assess and levy on every regular or permanent employer of workmen and employees affected by this chapter, and he is hereby ordered to assess and levy, annual premiums determined in accordance with the preceding section, on the total amount of wages paid by said employer to workmen and employees who were or would have been entitled to the benefits of this chapter during the year prior to the levying of the premiums; Provided, That said premiums shall be collected semiannually in advance by the Manager of the State Insurance Fund; Provided, further, That the Manager shall proceed to collect by constraint proceeding as established in the Administrative Political Code of Puerto Rico the unpaid premiums within the term legally fixed by the Manager or any extension thereof. The Manager is likewise authorized and empowered to assess and levy on every eventual or temporary employer premiums for such time as his operations may last, which premiums shall be paid upon executing the proper policies and shall be divided into fiscal-year semesters, according to the estimated period during which the wages and salaries are to be paid; Provided, That the Manager may, in his discretion, divide the payment into semesters in advance. In the case of departments, boards, agencies, bureaus, commissions, and instrumentalities of the Commonwealth Government, the Manager, with the approval of the Secretary of the Treasury, may divide the payment on the basis of premiums due at the end of each month, which shall be paid with the salary payroll of said government organizations, without affecting their status as insured. The Secretary of the Treasury shall indicate the date and manner said payments shall begin to be made.

In case any employer covered by this chapter fails to insure properly, the Manager may assess and levy on, and collect from him premiums for all such time as said

employer may have remained uninsured, in the same manner as if he were insured.

After said premiums have been collected, they shall be covered into the treasury of Puerto Rico, in the State Insurance Fund established by this chapter.

The premiums for regular or permanent employers shall be levied as soon as the payroll return hereinafter referred to is received in the office of the Manager, the basis therefor, subject to investigation and revision by the Manager, to be the total amount paid by the employer for wages, salaries and other compensation paid to the laborers employed by him during the previous year and who were or would have been entitled to the benefits of this chapter.

If any employer fails to make and submit the payroll return on the date fixed by law, or in accordance therewith, or if wilfully or otherwise makes a false or fraudulent return which, according to the experience obtained in connection with similar operations, is evidently inadequate, the Manager, through his duly authorized agents, shall make the return from his own knowledge and in accordance with the information and data he may have obtained. Any return submitted in this manner and suscribed by the Manager or any of his duly authorized agents, shall be prima facie valid and sufficient for all legal purposes.

Should a regular, eventual, or temporary employer fail to pay the total amount of the preliminary or additional premiums legally levied on him within the time fixed by the Manager, the latter may grant an extension of thirty (30) days so that the employer may make the payment in full, which full payment shall be an indispensable requirement for the Manager to make effective any insurance policy.

Any employer who, prior to July 1 or January 1 of any year, ceases to be subject to the provisions of this chapter, may be excused from the payment of premiums for

the following semester or semesters by filing the notice and proof required by the Manager of the State Fund that he will not be subject to the provisions hereof. Any employer subject to the provisions of this chapter during any part of a semester shall pay the premiums for the whole of said semester, but he shall be entitled to such reimbursements, if any, as are provided in the following section; Provided, That in such cases reimbursements may be made at the expiration of the semester for which said premiums were paid.

No employer shall be entitled to rebate upon the payment of his annual premiums, or to reimbursement, for any period of time for which, due to his failure to pay the full amount of the premiums within the term fixed, or for any other cause provided for in this chapter or in the regulations lawfully promulgated hereunder, he was deprived of the immunities that this chapter provides as to injuries, diseases or deaths suffered by the workmen or employees of such employer during the period covered by the payment of such premiums; Provided, That no coverage may be allowed to any employer for the second semester of a policy year if he has not previously paid the total assessment corresponding to the first semester.

• • •

§ 27. Adjustment of Premiums

At the end of each fiscal year, the Manager shall compare the payroll of each employer paying premiums in accordance with this act for such fiscal year, with the payroll of the preceding fiscal year on the basis of which the premiums were assessed, levied and collected; and if the payroll for the year during which the insurance was effective is greater than that of the previous fiscal year for which said premiums were assessed, levied, and collected, the Manager shall assess and levy, and shall collect, on the difference, as provided in this act, additional

premiums in the same manner and on the same basis as the original premiums were assessed, levied and collected; and if the payroll for the year during which the insurance was effective is less than that of the previous fiscal year for which the premiums were assessed, levied, and collected, the Manager of the State Insurance Fund shall refund or credit without interest or discount, from the State Insurance Fund, the proportion of the premiums corresponding to the difference between the actual payroll for the year during which the insurance was effective, and the year for which said premiums were assessed, levied, and collected, if the Manager can verify to his full satisfaction that the wages, salaries and other remunerations declared by the employer in the statement or report hereinafter provided for have been correctly stated.

§ 28. Annual Statement of Employer

It shall be the duty of every employer to file with the Manager, not later than July 20 of each year, a statement showing the number of workmen employed by said employer, the kind of occupation or industry of said workmen, and the total amount of wages paid to said workmen or industry during the preceding fiscal year; Provided, That at the request of the employer and for the cause shown, the Manager may extend said term for a period of not more than fifteen (15) days. The premiums prescribed in sections 26 and 27 of this title shall be computed on the total amount of wages declared in said statement; Provided, That every employer employing workmen covered by this chapter for any term or part of a semester shall file the aforesaid statement showing the number of work men or employees employed, the kind of occupation, and the estimated wages to be paid to said workmen or employees, and on such sum the premiums to be paid by the employer shall be computed; and upon the termination of the work of said workmen or employees

the employer shall file a statement like the one above mentioned, showing the total amount of wages paid, on which sum the corresponding liquidation shall be made; and if this payroll is greater than the previous one, the Manager shall assess and levy, and shall collect, as provided in this chapter, additional premiums on the difference in the same manner as that hereinbefore prescribed.

Should the employer fail to file said statements on the dates specified above, he shall be guilty of a misdemeanor, punishable by a fine of not less than twenty-five (25) dollars nor more than one thousand (1,000) dollars, or by imprisonment in jail for not less than fifteen (15) days nor more than six (6) months, in the discretion of the court. In case of recividism both penalties shall be imposed. Any part of the Superior Court, on motion of the Manager of the State Fund, shall order the employer to file the aforesaid statements within a peremptory term; and if he fails to file such statements, disobedience to said order shall constitute contempt and be punished as such. Any employer who knowingly falsifies the information required by said statements shall be subject to the same penalty prescribed for failure to submit such statements.

Any employer who has been covered by the State Fund up to the end of the preceding fiscal year and is covered beginning with July 1 of the current year, shall also be covered during the period from July 1 to July 20 granted by this chapter to file the payroll or statement; Provided, That every employer who has not filed the statement to which this section refers within the term herein fixed shall be considered as an uninsured employer.

The Manager and those employees having direct and specific intervention in the assessment, collection, and investigation of premiums are expressly empowered to administer the oath required by this chapter and shall exercise all the powers and rights conferred on the internal-revenue agents of the Department of the Treasury.

Any employer considering himself not obliged to comply with the requirements of this section shall state such fact before the Manager of the State Fund.

The insurance of each employer by the State shall be in force immediately after his payroll or statement has been filed in the office of the Manager of the State Fund, together with the amount of the premium corresponding to the percentage of the wages declared in said statement, in accordance with the rates fixed by the Manager; Provided, That any accident that occurs before payment of said premiums is made shall be considered as a case of an uninsured employer, unless the employer pays within the term fixed by the Manager of the State Fund, in which cases, the insurance shall begin to run from the date on which the employer filed the payroll or statement in the office of the Manager.

On receipt of payment from an employer, the Manager of the State Fund shall forward to said employer the receipt for such payment, which receipt shall be prima facie evidence of said payment of the premiums and of said employer's compliance with the provisions of this chapter. Until such payment is made by the employer, he shall not be entitled to the immunities provided by this chapter in regard to such injuries, diseases, or deaths as may be suffered by the workmen or employees of such employer during the period covered by the payment of such premiums.

Every recital of facts appearing in the statements required by this section and every deposition made under this section for the purpose of obtaining that any employer be relieved from the fulfillment of any requirements hereof, shall be considered to be made under oath.

• • •

§ 31. Revision of Premiums and Rebates

Not later than July 1 of each year, the Manager of the State Fund, giving consideration to the experience obtained in the administration of the law, shall principally revise the rates in force so as to make an equitable distribution of the losses among occupations and industries, and so that rebates in premiums shall approximate as nearly as possible to the experience of each particular group of occupations and industries; and to this end the Manager of the State Fund is empowered to prescribe rules relative to such rebates as may be granted to each employer in accordance with his risks, on the basis of the individual experience of the employer and the adjustment of each employer's rate, thus establishing a fair margin in excess of, or lower than, the rate taken as a basis for the classification of such employer, in order that this measure may tend to further the prevention of accidents and to preserve in each risk the basic principles of workmen's compensation insurance.

• • •

RULES AND REGULATIONS OF PUERTO RICO

Title 11

Chapter I

Workmen's Accident Compensation

• • •

§ 8-2. Appeals

(a) Any party aggrieved by a decision of the Manager may take appeal therefrom to the Commission within the term of 30 days counting from the date on which copy of the decision is served on such party by the former.

(b) In case the Manager mails to the last known address of the party a copy of his decision in a sealed envelope with sufficient postage and with the address of the Fund for its return, it shall be presumed that the same was delivered to the addressee.

(c) An appeal shall be established upon the filing of notice of appeal with the Secretary, preferably on the printed forms furnished by the Commission, and it shall contain:

(1) In case of an appeal taken by an employer from a decision of the Manager fixing rates, or referring to a particular classification, the substantial information required by the statute, and in such case the employer shall serve the Manager with a copy of his notice of appeal, and shall state the fact at the foot of the original of such notice of appeal. It shall be the duty of the Manager to appear before the Commission to answer said appeal within the term of 15 days granted by the Law for that purpose.

• • •

(4) Upon answering the appeal the Manager shall file with the Commission, together with his answer, a copy of the decision appealed from. In any case the Manager shall,

within 48 hours after having been served with a notice of appeal, transmit to the Secretary of the Commission a copy of the decision appealed from.

(c) The Secretary shall enter on the notice of appeal the date and hour it was received, and shall proceed to register it immediately in the corresponding docket.

• • •

§ 19-9. Payment of Premiums

(a) The payment on account of the annual premiums corresponding to the first semester of the fiscal year, shall be 50 percent of the total amount of the premium computed in accordance with the rates applied to the total payroll paid by the employer to his workmen and employees during the previous fiscal year. The difference or balance, corresponding to the second semester of the fiscal year, shall be paid at the beginning of said second semester, within the time limit fixed by the Manager of the Fund.

(b) Failure to pay the total amount of premiums imposed upon any employer, within the term accorded him for payment or its deferment, will suspend the effects of the policy and deprive the employer of any immunity with respect to injuries, sickness or death, occurring to his laborers or employees; Provided, That the nonpayment of any semester premiums by regular or permanent employers as well as by eventual or temporary employers, will suspend the effects of the policy from the initial date of the semester, with no right to reimbursements for period of suspended policy coverage, until payment is made; Provided, further, That until full payment of the first semester premium is made, no coverage for the second semester will be recognized to any employer. In the case of complementary or additional premiums the suspension will be effective upon the expiration of the term fixed by the Manager for its payment or its extension.

(c) At the beginning of each fiscal year, or in case of adjustment or liquidation of a policy, the Manager shall compare the payroll reported by the employer with the payroll of the preceding year or with estimated payroll taken as basis for the computation of the premium assessed and collected; and if the payroll under audit is greater than that on which the premium was assessed, the Manager shall assess and levy and the Treasurer shall collect additional premiums in the same way and on the same basis used for the assessment and collection of the original premiums. If the payroll is less than the one on which the premium was assessed, levied and collected, the Manager shall refund or credit the employer and charge against the State Fund, the difference between the actual payroll and that on which the premium was originally collected, provided that the Manager is enabled to verify to his entire satisfaction that the wages, salaries or other remuneration so stipulated and reported by the employer to the Manager or shown by his records are correct and represent his true payroll.

(d) Uncertified checks received by the Manager from employers in payment of premiums shall be considered as not received, if dishonored. In such cases, the employers responsible shall be held subject to the punishments prescribed by the law and the rules in force.

* * *

TRANSLATION

IN THE INDUSTRIAL COMMISSION OF PUERTO RICO

Case C. I. 73-5-3957, 73-5-3956

Policy No. 3002, 2284

Re: Review of Premiums

EMPLOYERS:

COCA COLA BOTTLING CO. OF P.R.
SEARS ROEBUCK DE P.R., INC.
on their own behalf and on behalf of all those employers in a similar juridical position in Puerto Rico

vs.

STATE INSURANCE FUND, *Defendant*

Resolution

PART A: *Statement of Facts:*

By a communication signed by the Manager of the State Insurance Fund, Mr. Guillermo Atiles Moreu, there was established in the agency an administrative practice whereby there was established the norm of fixing a maximum limit on the individual salaries and wages subject to the payment of premiums of $5.200.00 annually per employee.

Said written communication had the effect and the purpose of amending administratively paragraph (b), Section 6 of the Rule X of the Internal Regulation of the State Insurance Fund.

> "The payroll of all the executive officials shall be included in the payroll for general payment limiting itself to an individual maximum payroll of $100 per week . . ."

Said amendment made uniform the maximum wage or workday which the employers were obligated to pay for their employees together with the highest maximum which had been fixed for the *official executives* pursuant to the foregoing paragraph (b), of the section, Rule X, quoted above. In paragraph (a) of Section 6 of said rule all of the officials of a corporation who are elected or named in accordance with its constitution or regulation are considered *official executives*, including those known generally as president, vice president, secretary and treasurer.

Commencing from this date the administrative practice was to limit to $5,200.00 the wages, salaries and other compensation for the employees upon submitting the payroll statement for each policy year. *Since 1954 until 1973 the Manager of the State Insurance Fund accepted said payroll statements, collected the premiums and extended to the employers the protection provided by law of exclusive remedy against the employer*, as provided in Article 20 of our Compensation Law for Job Accidents in force (11 L.P.R.A. Sec. 21). In addition, the Manager extended to him the corresponding benefits provided by law to the workers and employees of said employers.

During the years comprised between 1954 to 1973 the economic solvency of the Fund and the reasonable surplus which, in accordance with the law it should have, was considerably increased. See information which appears in the Planning Board, income and profit 1973, Bureau of Economic Planning, table number 1 and table number 12. (Appendices 1 and 2 of the resolution)

On October 2, 1969 the Manager of the State Insurance Fund, Mr. Ramón A. Rivera Rivera, issued a memorandum wherein he *recognizes the existence of an administrative practice which was never incorporated in the regulation*, but instructs so that commencing on that date, October 2, 1969, there should be left inoperative the administrative practice in common use with respect to extending the benefits of paragraph (b), Section 6 of Rule X, to workers and/or employees who receive an annual wage in excess of $5,200.00 and points out that for the purposes of the imposition and collection of premiums there should be considered the total of the payroll earned or paid of all the officials, employees and workers of any employer eliminating the top maximum of $5,200.00 and maintain said maximum for the executive officials, as provided in said regulation. It is to be noted that even though said memorandum #147-69 is dated October 2, 1969, the instructions contained in the same shall commence to be effective the preceding day, that is, the 1st day of October 1969.

After this memorandum the Division of Interventions of the State Insurance Fund ordered the accountants to investigate the books of the employers. From this investigation there resulted that the latter were not informing the Fund in the payroll statement, the total of wages and other compensations earned by their employees in accordance with the instructions contained in the memorandum 147-69 of October 2, 1969, and from said interventions there resulted additional premiums to be collected and as a result the Manager sent to the employers the notification for the collection of premiums collecting the additional ones, that is, they were notified of deficiencies in the year 1973 retroactive to the period comprised between 1969 and 1973.

Not being in agreement therewith the employers herein complainants took recourse in an appeal before this Agency pursuant to the provisions of Article 24 of the Law (11 L.P.R.A., Sec. 25).

PART B: *Stipulations.*

During the course of the hearing prior to the public hearing held on December 4, 1973, the parties subscribed

the following stipulations for the purpose of limiting the controversy, which were made applicable to all the employers who were in the same situation before the Industrial Commission, all in accordance with Rule 20 of the Rules of Civil Procedure of 1958, paragraph (c), which refer to the *actions* that affect one class when there exists a common question of facts and of law which affect the solidary rights and a common remedy is requested:

1. That the administrative practice for more than 15 years was to impose premiums on the maximum basis of $5,200.00 wages per employee, in accordance with instructions released by internal written communication on August 6, 1954, by the then Manager, Guillermo Atiles Moreu.

2. That by internal memorandum #147-69 dated October 2, 1969 the then Manager, Mr. Ramón A. Rivera Rivera, declared inoperative said administrative practice and instructed that from October 1, 1969 said basis of $5,200.00 be eliminated and that the premiums be assessed, imposed and collected in accordance with the total payroll of the salaries, wages, and other compensation which the employee may receive.

3. That the employers did not have any knowledge of internal memorandum #147-69 to which we have referred *until the middle of 1973.*

4. That no publicity was given to said memorandum through the communication channels of the country.

PART C: *Controversy:*

Does the Manager of the State Insurance Fund have the authority to change a norm, practice and administrative interpretation in force for 15 years by an internal memorandum to the Agency without previously giving an opportunity to the affected parties to be heard, by the corresponding notification and public hearing to those parties nor to give them reasonable time to prepare themselves adequately for said public hearing?

PART D: *Position of the Manager:*

The position of the Manager is to the effect that in accordance with the law he is obligated to assess, impose and collect premiums on the basis of the total amount of the payroll which includes the total amount of the wages, salaries and other compensation paid to the workers and that the instructions given on August 6, 1954 by the then Manager, Atiles Moreu, cannot prevail above the law and from its commencement were void and nonexistent. He alleges, furthermore, that said instructions were never incorporated in the Regulation nor did they comply with the requirements imposed by the law on Regulations of 1958 (3 L.P.R.A. Sec. 1041 et seq). The Manager alleges that the memorandum issued by the Manager Atiles Moreu, as well as the subsequent one by Mr. Ramón A. Rivera Rivera, did not go beyond and internal order to some officials of minor importance of the Fund for the exclusive use of the Agency. The Manager alleges that the legislative purpose is to maintain a fund with a reasonable surplus and solvent to furnish the services and benefits which by law it is obligated to render and that he could not comply with this legislative purpose if he maintained the maximum basis of $5,200.00, therefore it becomes completely necessary to assess, impose and collect the premiums on the basis of the total amount of the wages, salaries and other compensation paid to the employees.

PART E: *Allegations of the employer:*

The employers maintain that the administrative practice established and in effect since 1954 created a status of right between the parties by which they were only obligated to file in their payroll statements a maximum basis

of $5,200.00 per employee, all of which is in accordance with an administrative interpretation given by the Manager of the law.

That pursuant to that administrative interpretation they were paying the corresponding premiums for more than 15 years and during that period of time the legislative purpose which permeates the whole law was fully complied with, that is, to render services and benefits to workers injured in an on-the-job accident establishing thereby, a solvent fund and a reasonable surplus by the imposition of the lowest possible premiums to the payrolls of the employers. That the action of the Manager and his interpretation of the law in 1954 in no way prejudiced the economic solvency of the Fund and complied with the legislative purposes. That the administrative practice in use from 1954 to 1969 was unilaterally changed by the Manager by virtue of memorandum #147-69, without notifying or holding public hearings, nor giving explanations to the employers, which results in a deterioration of contractual relations and a violation of the due process of law due to the lack of procedural reasonability of notification and hearing of the employers who were to be affected by said administrative determination.

The employers allege, furthermore, that the Manager accepted the payroll statements prepared by the employers in accordance with the administrative practice in use, liquidated the premiums due in accordance therewith and never questioned the validity of the policies issued, resulting in the fact that he is now prevented from going against his own actions; he cannot do it neither in law nor in equity.

PART F: *Discussion and analysis of the law and the applicable decisions:* *In Ramón Méndez Martínez et al* vs. *State Insurance Fund*, C.I. 71-5-2821, F.S.E. 70-12-56, resolved by this Agency on December 5, 1973 there is fully discussed the legislative purpose which permeates our law and the duties and rights of the employers affected thereby. There

we pointed out that Article 28 of the Law (11 L.P.R.A., Sec. 29) imposes the obligation upon the employer of initiating the pertinent steps to comply within the designated period the obligation of insuring the compensation of the workers it employs in accordance with Article 18 of the Law. The Manager is not obligated to take any steps to have the employers subscribe to the benefits thereof; it is their duty to do so. In the *exposition of motives* of Law #45 of April 18, 1935, as amended, which creates the Workmen's Accident Compensation Law there was established the following purpose:

> "Law to promote the welfare of the inhabitants of Puerto Rico with respect to accidents which may cause the death or injury or sickness or death coming from the occupation of the workers in the course of his employment, to establish the duty of the employers to compensate their workers or beneficiaries as defined in this law, because of sickness or death coming from his occupation, injuries or death, independent of negligence and to provide the means and methods to carry out this duty; . . ."

The purpose expressed by the law cited above with respect to "promoting the welfare of the inhabitants of Puerto Rico with respect to accidents which may cause the death or injuries or sickness coming from the occupation of the workers in the course of his employment", has its constitutional relationship with the Organic Act of 1917 as the Jones Act.

The Jones Act in its Article 2, paragraph 10 provided that:

> "Nothing contained in this law shall be interpreted in the sense of limiting the power of the Legislative Assembly to enact laws *for the protection of the life, health and safety of the employees and workers.*" (underlining ours)

This right which the workers had is taken up by the Constitution of the Commonwealth of Puerto Rico of 1952 in its Article 2, Section 15 wherein it states that:

> ". . . the right of every worker . . . to protection against risk to his health or personal integrity in his work or employment."

Article 2, Section 19 of the present Constitution authorizes the Legislative Assembly "to approve laws for the protection of the life, health and welfare of the people."

From the foregoing we can conclude that the Workmen's Accident Compensation Law, as it was originally written and approved in 1935 as well as in its present form, as amended, is the product of the legitimate constitutional authority of the legislative power to promote the protection of the life, health, safety and personal integrity of the workers, employees and inhabitants in general of Puerto Rico. The constitutionality of the Workmen's Accident Compensation Law has been upheld on repeated occasions by the Supreme Court of Puerto Rico. (*Cortés* vs. *Comisión Industrial*, (1962), 85 D.P.R. 241; *Córdova* vs. *Comisión Industrial*, 79 D.P.R. 673; *Sucesión Rodríguez (Estate of Rodríguez)* vs *Comisión Industrial*, 53 D.P.R. 825).

The Workmen's Accident Compensation Law is a matter of public interest and is unquestionably the domain of our Legislative Assembly to regulate it. (*Cortés* vs. *Comisión Industrial*, supra).

The system of compensation to workers is administered and implemented in its executive and administrative phase which the law calls the State Insurance Fund (Article 6 of the Law). The parties affected by the actions of the State Insurance Fund can request a review before the Industrial Commission as a reviewing agency and with quasi-judicial powers (Article 6, 11 L.P.R.A., Sec. 8).

To insure the effectiveness of the system of compensation for job accidents the legislator expressly provided as a legislative purpose the establishment of a solvent State Insurance Fund and to create a reasonable surplus imposing the lowest possible premiums consistent with said aim. (Article 23, 11 L.P.R.A., Sec. 24; *Montaner* vs. *Comisión Industrial*, 54 D.P.R 55).

In *Ramón Méndez Martínez* vs. *Fondo del Seguro del Estado* (State Insurance Fund), supra, we pointed out that:

> "The system of insurance for compensation of job accidents generates its income by the issuing by the State Insurance Fund of policies covering job risks which are fixed considering the trades, industry, number of workers, payrolls and other pertinent criteria. (Art. 23, Workmen's Accident Compensation Law).
>
> The insurance policies for the compensation are paid by the employers (Arts. 25, 26 and 27, Workmen's Accident Compensation Law). Said policies are payable by semesters. (Art. 25, Workmen's Accident Compensation Law).
>
> Since all the employers in Puerto Rico must pay said policies, the latter provide the economic resources which maintains the system of compensations in a state of solvency which permits compliance with the aims and purposes of the Law.
>
> *The legal duty of the employer and its consequences:*
>
> It is the legal duty of the employer to render a statement specifying the number of workers it employs, the occupation or industry and the wages paid the previous economic year. Said information should be presented to the State Insurance Fund no later than the 20th day of July of each year. (Art. 27, Workmen's Accident Compensation Act). Said term can be ex-

tended for justified reasons, for an additional 15 days (up to August 4).

The amount to be paid by the employer for its insurance policy is computed in accordance with the total amount of the wages stated in the report which the employer should render. Not rendering said report on time can result in the incurring of a misdemeanor on the part of the employer. (Art. 27, Workmen's Accident Compensation Act, 11 L.P.R.A., Sec. 28).

Every employer who has not presented the report of payrolls and wages is considered an uninsured employer."

An employer who does not comply with the provisions of the Law or the Regulation promulgated by the Manager and who is declared an uninsured employer incurs in serious legal and economic consequences if an accident occurs during the period of time in which it is declared uninsured:

1. If the employer does not pay the corresponding premiums at their expiration under the law it is a criminal offense (11 L.P.R.A., Sec. 18), and is liable to additional penalties and civil responsibilities. (11 L.P.R.A., Sec. 16).

2. The Manager can paralyze the activities or operations of an employer who does not have the corresponding insurance (11 L.P.R.A., Sec. 2, paragraph 2).

3. The employer who wants to review the determination of premium imposed and assessed by the Manager should pay the same in order not to be declared as uninsured while his petition is being heard before this Agency. (11 L.P.R.A., Sec. 25, paragraph 2).

4. The law does not provide for the payment of interest for the amount of premiums paid and in dispute, in

case it is determined that the employer is not obligated to pay them. The law does not provide for the posting of a bond to guarantee the amount of the premiums in dispute.

5. The law prohibits the courts of law to issue writes of "injunction" holding up the collection of said premiums while the case is being reviewed before this Agency. (11 L.P.R.A., Sec. 25, paragraph 2).

6. The law provides that in the case in which this Agency resolves to lower the premium, that the Manager has fixed and collected, it cannot be ordered that the surplus which may have been paid is to be returned, but that said surplus will be deducted from to premiums or taxes to be collected in the future from the employers who shall file the petitions. (11 L.P.R.A., Sec. 25, paragraph 3).

In view of the foregoing, the consequences are serious when the *employer is declared uninsured* if the employer does not comply with the requirement to file its corresponding reports or premiums within the period specified by law, the regulation and the administrative orders or interpretations implemented and executed by the Manager. The effectivity and duration of its policy commences from the date in which the payment of the policy is made and remains without protection or coverage for the period comprised between the commencement of the semester and the date of payment. (*Montaner* vs. *Comisión Industrial*, 59 D.P.R. 396; *Central Cambalache* vs *Comisión Industrial*, 63 D.P.R., 375).

The Workmen's Accident Compensation Act expressly authorized the Manager to dictate reasonable and appropriate rules to regulate the administration of the Fund, which, upon being approved by the Governor have the power of law. (Article 6, 11 L.P.R.A., Sec. 8: *Alemañy* vs. *Comisión Industrial*, 64 D.P.R. 888, 889).

In administrative law the term *regulation* will depend on many occasions from the practical context given to the administrative agency (1 Davis Administrative Law Treatise, Sec. 5-01). An agency can be obligated by the establishment of proper customs and practices, as well as by its formal regulations. (*Briscoe* vs. *Kruper*, 435 F 2d 1046, 1055).

It is clear then, that the Manager of the State Insurance Fund can promulgate regulations within the framework conferred upon him by the law and then after approval by the Governor shall have the power of law, now then, we should distinguish the nature and the effects that exist between rules or administrative practices of an interpretive character of the law and rules which upon being promulgated have the power of law also known as legislative rules.

Professor Davis, supra, en Section 5.03 makes the following distinction between both rules; the so-called legislative rule is the result of an exercise of the legislative power delegated to an administrative agency by virtue of a delegation made to it by the Legislative Assembly, that is, it is when the statute confers power upon the agency to establish rules which will have the power of law as if the legislative power had approved it, provided that said rules are within the framework of the delegated power and complies with the requirements of the statute. A legislative rule is considered valid and shall be sustained by the courts of justice as a statute if:

a) It is within the powers delegated.

b) It was approved by the proper proceedings, and

c) It is reasonable.

The so-called interpretive rule may or may not have the power of law depending upon certain factors or criteria, that is:

a) Depending on whether or not the courts are in agreement with said rule.

b) Depending upon whether said rule is within the special jurisdiction of the Manager and beyond the general jurisdiction of the courts.

c) Depending upon whether the rule is a contemporary interpretation of the statute made by the former to those who were assigned the task of implementing and reinforcing said statute.

d) If the rule has been upheld for a long period of time in administrative practice, and

e) If the statute has been amended by the legislators with a knowledge of the content of said rule and it has not been changed.

The interpretative rules can interpret:

1. A statute.
2. A legislative rule.
3. Another interpretative rule.
4. A judicial decision.
5. An administrative decision.
6. Some administrative regulations.
7. Another law or interpretation.
8. A combination of the factors mentioned above.
9. Nothing.

In the present case we should determine the judicial concept of the internal memorandum released by Manager Atiles Moreu on August 6, 1954 to determine whether it is an interpretive or legislative rule or an internal order per se.

Professor Davis, supra, in Section 5.05 of his treatise points out that upon reviewing a legislative rule the court is free to take three determinations:

1. If the rule is within the framework of the delegated authority.

2. If it is a reasonable one.

3. It was promulgated in accordance with the proper proceeding.

In cases in which interpretive rules are involved, the decision which the court may render is not with respect to its validity but if it is, whether it is appropriate and correct. The courts will give greater weight to the rule when the administrative interpretation and practice has been made contemporaneous with the promulgation of the statute or when it has been consistently followed for a reasonable period of time.

In the case of *Gibson Wine Co.* vs. *Snyder*, 194 F 2d 329, 331-332 it stands out among the interpretive and legislative rules and it is pointed out that the interpretive ones do not require notification nor hearing and are opinions with respect to the significance of the statute; whereas the so-called substantive or legislative rules are those which have the power of law and usually implement existing laws, which require notification and hearing upon being promulgated.

We are conscious of the fact that in the Workmen's Accident Compensation Act there is not defined the meaning of "total payroll", "the total amount of the wages earned", nor does there exist an express delegation which authorizes the Manager to define, limit or regulate the meaning of said phrases. Our reviewing function is not detained because of the mere fact that a study of the statutes of the law demonstrates the foregoing to us. We should look for it then in the administrative practice and in the legislative intention.

In *Chester Bowles* vs. *Seminole Rock & Land Company*, 325 U.S., 410, 414, it is pointed out that:

> "Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation of the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the *ultimate criterion is the administrative interpreiation* which becomes controlling weight unless it is plainly erroneous or inconsistent with the regulation." (Emphasis supplied). Cited with approved in *Western Union Telegraph Co.* vs. *U.S.* F. 2d 579, 581 (1954).

In *American Trucking Ass'n* vs. *U.S.*, 344 US. 298, 309-310 it is pointed out that:

> "Here, appellants have framed their position as a broadside attack on the Commission's asserted power. All urge upon us the fact that nowhere in the Act is there an express delegation of power to control, regulate or affect leasing practices, and it is further insisted that in each separate provision of the Act granting regulatory authority there is no direct implication of such power. Our function, however, does not stop with a section-by-section search for the phrase 'regulation of leasing practices' among the literal words of the statutory provisions. As a matter of principle, we might agree with appellants' contentions if we thought it a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. But no great acquaintance with practical affairs is required to know that such prescience, either in fact or in the minds of Congress, does not exist. *National Broad-*

casting Co. vs. *United States,* 319 US 190, 220, 87 L ed 1344, 1364, 1365, 63 S Ct 845, 133 ALR 1217. Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created, for it is the fond hope of their authors that they bring to their work the expert's familiarity with industry conditions which members of the delegating legislatures cannot be expected to possess. *United States* v. *Pennsylvania R. Co.* 323 US 612, 39 L ed 499, 65 S Ct 471.

Moreover, we must reject at the outset any conclusion that the rules as a whole represent an attempt by the Commission to expand its power arbitrarily; there is clear and adequate evidence of evils attendant on tripleasing. The purpose of the rules is to protect the industry from practices detrimental to the maintenance of sound transportation services consistent with the regulatory system."

In *Wiscovitch* vs. *Comisión Industrial,* 99 D.P.R. 651, our highest court has recourse to the legislative intention and to the provisions of the Regulation of the Industrial Commission to resolve a situation "sui generis" and determines that the interpretation given by the Manager is not the result of experience.

In Page 658 of that case the following is pointed out:

> "We are faced with rather than a practice, a problem of interpretation of an administrative regulation. Our mission is to be watchful that the interpretation of the administrative agency finds support in the purpose found in Section 35 of the Law." (Cases omitted)

It is inferred from said opinion that if the interpretation made by the administrative agency finds support in the legislative purpose which the statute creates, then that in-

terpretation will prevail and will be converted into an administrative practice. It is to be noted that our highest court in the case of *Wiscovitch,* supra, replaces the administrative interpretation by its own interpretation of the meaning of the words "in no case"; it being understood that in that way the legislative purpose is being complied with, with respect to this see the case of *New York Foreign Freight* vs. *Federal Maritime Com.,* 337 F 2d 289, 295 wherein citing Judge Frank in his opinion rendered in the case of *U. S.* vs. *Obermeier,* 186 F. 2d 243 (2d Cir. (1950)), cert. denied, 340 U. S., 951 pointed out:

> "A regulation is presumptively valid, and one who attacks it has the burden of showing its invalidity. A regulation or administrative practice is ordinarily valid unless it is (a) unreasonable or inappropriate or (b) plainly inconsistent with the statute."

However, see the case of *Addison* vs. *Holly Hill Fruit Products Inc.,* 322 U. S. 607, opinion of Judge Frankfurter wherein on page 619, after revoking the judicial interpretation of area of production which the *Circuit Court* had made, in substitution of the administrative criteria he pointed out: "It is not for us to write a definition, that is the administrative duty".

Upon determining whether a rule is interpretative or legislative we should examine within the wide framework of the development of the administrative right and the new currents in the administration of justice, its aim and its differences. Sometimes it is difficult to extract the meaning of a statute adherely solely to its bare terms, without reference to the noticeable circumstances by the courts that produce them. (*Hernández Denton* vs. *Juan Quiñones Desdier,* resolved by our highest court on May 1, 1974, Ref. Col. Abog. (Bar Assn.) 1974-45.

The administrative decisions have in their favor a presumption of legality and correction. (*Asociación de Dueños*

de Casas Veraniegas de Las Pargueras (*Association of Summer Home Owners of Las Pargueras*) vs. *Tribunal Superior*, resolved on January 16, 1974, Ref. Col. Abok. (Bar Assn.) 1974-4).

The administrative right came into being for the purpose of establishing a fair, practical and flexible system for the adjudication of rights in the agencies of the executive authority. (*Puerto Rico Telephone Co.* vs. *Tribunal Superior*, resolved on May 7, 1974, Ref. Col. Abog (Bar Assn.) 1974-45).

There should be given to a statute a reasonable interpretation and a literal application of the same which results in absurd consequences should be avoided whenever a law can be given a reasonable interpretation consistent with the legislative purpose. (*Esso Standard Oil* vs. *A.P.P.R.*, 95 D.P.R. 772, 783).

The law should be interpreted taking into consideration the purposes it pursues and the manner in which the interpretation adjusts itself to the "rational basis or essential goal of the law" and to public policy that inspires it. (*Esso Standard Oil*, supra).

As can be inferred from the foregoing, upon determining the validity of an administrative decision, the cardinal point is whether the same finds support in the legislative purpose. From this it can be inferred that *the administrative actions do not increase the administrative power. This is subordinated to the statute that creates it, the legislative purpose and the general principles of law, equity and the Constitution.*

An administrative act inconsistent with the statute cannot prevail. (*Const., Equip. Corp.* vs. *Comisión Industrial*, 88 D. P. R. 259).

In the creation of offenses and in the imposition of penalties or criminal sanctions the Manager does not have

discretion and should adhere to the provisions of the statute or otherwise the courts will intervene voiding such administrative regulations and decisions. (*Cervecería India* (India Brewery) vs. *Secretario de Hacienda* (Secretary of the Treasury), 80 D. P. R. 271; *Descarte* vs. *Tribunal Superior*, 71 D. P. R. 471; *Chabrán* vs. *Bull Insular Line*, 69 D. P. R. 269; *Buscaglia* vs. *Tribunal Superior*, 67 D. P. R. 57; *Ex Parte Irizarry*, 66 D. P. R. 672; *Villa* vs. *Comisión Industrial*, 65 D. P. R. 562; *Pueblo* vs *Bou* 64 D. P. R. 466; *Colón* vs. *Trigwell*, 65 D. P. R. 924; *Pueblo* vs. *Villalba*, 86 D. P. R. 318; *Isidoro Infante vs. Tribunal Examinador de Médicos* (Physicians Board of Examiners), 84 D. P. R. 308).

In *Ex Parte Irizarry*, supra, on page 676 our highest court points out that:

> "The goal pursued upon delegating the power of regulation cannot be other than the implementing the enforcement of the law, but that power can never be exercised in such a way that it replaces the criteria of the legislator for that of the Board or person authorized to regulate. And even less can any Board or person, by virtue of the power to regulate granted to it by the Legislature, create an offense that the Legislature itself did not enact.'

This case is distinguishable from the present case because in *Ex Parte Irizarry*, supra, the Manager went beyond and without authority of the law created an offense based on facts which the Legislature itself did not expressly authorize. In our case we are not dealing with the promulgation of an offense by a regulation having the force of law, but of an administrative decision interpreting the statutory norm.

In *Luis Beltrán* et al vs *E.L.A.*, resolved on March 29, 1974, Ref. Col. Abog. (Bar Assn.) 1974-39, our highest court upon reviewing a decision of the Superior Court of

Aguadilla, which dismissed a claim for damages against the Commonwealth of Puerto Rico on the basis of a literal interpretation of Article 5 of Law #10 of 1955, (32 L.P.R.A., Sec. 3077 et seq), points out that:

> "We should not now give literal interpretation to said provision and ignore the true legislative intention . . ."
>
> "We have seen that the plaintiff substantially complied with the strict interpretation of the statute . . ."

The abuse of discretion or arbitrary action by the agencies is related to the oppressive and unreasonable use of the power delegated to the agency. (*Belmonte* vs. *Mercado Reverón, Admr.*, 95 D. P. R. 257, Dissenting Opinion of Justice Belaval, Page 268).

In *Wong Wing Hang* vs. *Immigration and Naturalization Service*, 360 F 2d 715, 719 (2d Cir. (1966) Judge Friendly mentioned the fact that an action represents an abuse of discretion if upon taking it, the latter, in an unexplicable manner, deviates from established practices and norms without a reasonable explication. This same Judge in *NLRB* vs. *Majestic Weaving Co.*; 355 F 2d 851, 854 (2d Cir. (1966) points out the following:

> "Where for fifteen years the board considered conditional negotiations consistent with the statutory design 'the ill effect of the retroactive application of a new standard so far outweighs any demonstrated need for immediate application to past conduct . . . as to render the action 'arbitrary'."

The Manager of the State Insurance Fund has the authority to implement those administrative norms or practices which are not absurd, arbitrary and unreasonable or which provoke a clear injustice. We must determine, then, the validity of the internal memorandum of August 6, 1954 issued by the then Manager Atiles Moreu and the effect, if any, that it had on the juridical relations between the

Fund and the insured employers. The primary faculty is not discussed of implementing by administrative regulation and interpretations the provisions of the law involved herein which the Manager has. (*Rosario Mercado* vs. *San Juan Racing Ass'n.*, 94 D. P. R., 634, 642, (1957); Art. 6, 11 L.P.R.A, Sec 8).

The decisions of a specialized administrative agency deserve our great consideration and respect when they refer to conclusions and interpretations of administrative statutes (*Colonos de Caña de Santa Juana Inc.* (Cane Growers of Santa Juan, Inc.) vs. *Junta Azucarera* (Sugar Board), 77 D.P.R. 392, 396 (1954)).

And as was added in *South P.R. Sugar Co.* vs. *Junta* (Board) 82 D. P. R. 847, 864-65, this attitude acquires more importance when we review the decisions of certain agencies who are in charge of the regulation of complex technical, social or economic procedures. The administrative agencies have the initial and primary responsibility to elaborate the norms, which for such purposes are delegated by the Legislative Assembly with authority to regulate important economic activities under full legislative mandate which is ordinarily selected for that task for its recognized capacity and experience. These juridical criteria represent a moderation in the judicial anxieties of dictating the "improvements", solutions for the courts (including the quasi-judicial agencies), but the latter also receive a legislative mandate to review the administrative actions. No important problems arise in this area when the administrative action is obviously illegal, arbitrary, capricious or unreasonable, or when it is performed outside the clear procedural requirements of Constitution or law. (*Goldberg* v. *Kelly*, 397 U. S. 254, (1970)). It is when it constitutes an expression of a reasoned criteria and the due channels of procedure are followed that perplexities arise.

The circumstances of law, activity, facts and time, necessarily will decisively affect the final judicial answer. But as a basic norm, the courts have the obligation to require that the administrative conclusion be explicitly supported by reason and the law and is part of an integrated and reasoned pattern of regulation. (*South P. R. Sugar Co.* vs. *Junta (Board)* supra).

By virtue of what has been hereinbefore expressed we arrive at a first conclusion: that the communication written in the form of a memorandum by the Manager Atiles Moreu on August 6, 1954 which originated a reasonable and constant administrative practice for a period of more than 15 years, without any prejudice to the economic solvency of the Fund nor to the legislative purpose that permeates the law, it was in the nature of an interpretive rule which defined for the purposes of implementation of the law, the meaning of "total payroll" and "the total of the wages earned". (*Addison* v. *Holly Hill Fruit Products*, 322 U. S. 607 (1943)).

The reasons because of which we have arrived at this conclusion are the following:

1. The Manager is empowered by law to regulate, administer and establish administrative norms and practices not inconsistent with the statutes and the legislative purpose. We understand that his action was of this type. As a question of fact there is paragraph (b), Section 6 of Rule X of the Manual of Rules, Classifications and Rates of Compensation Insurance for Job Accidents which establish a maximum basis of $5,200.00 for all the official executives of a corporation. This regulation is presently in effect and no one doubts the authority the Manager has to modify it, eliminate it or confirm it, nor what he had upon approving it originally.

2. That said administrative practice prevailed for more than 15 years and was confirmed by the successor

Managers of Manager Atiles Moreu, Messrs. Ulpiano Vélez, Concepción Pérez Pérez and Ramón A. Rivera Rivera, until October 2, 1969. That said administrative practice did not endanger the solvency of the Fund nor did it affect its reasonable surplus and was compatible with the legislative purpose of maintaining the lowest possible premiums.

3. That the legislator upon amending the pertinent articles subsequent to the year 1954 tacitly accepted the interpretation which up until then had been given by the Manager to the question herein involved. (See Act #78 of May 30, 1970; Act #89 of June 22, 1957).

PART G: *What effect did the law have on Regulations of 1958 with respect to the interpretive regulation promulgated in 1954 by the Manager:*

Act #112 of June 30, 1957 (3 L.P.R.A., Sec. 1041 et seq) known as "Law on Regulations of 1958", provides in Section 5 that every regulation adopted by an agency of the government prior to June 30, 1957 which is not filed in the Office of the Secretary of State of Puerto Rico within the three months following said date shall be null and void. Section 6 of the law itself provides that the regulation approved subsequent to June 30, 1957 shall not be effective until the filing requirement therein provided has been complied with. Section 2 (3 L.P.R.A., Sec. 1042) defines the term Regulation in paragraph (b) in the following manner:

> "Regulation:—means every minimum wage decree and every rule or regulation, amendment to or revocation thereof, approved by any agency *with the exception of any rule, regulation or order that:*
>
> 1. Refers only to the order or internal administration of an agency, or
>
> 2. .....

3. .....

(Emphasis supplied)

In Puerto Rico there has not been any interpretation of the term "Regulation" and its exceptions regarding the provisions of Act #112 of June 30, 1957 since the case of *Rodríguez Rivera, Mayor* vs. *Comisión Para Ventilar Querellas Municipales* (Commission for the Investigation of Municipal Complaints), 84 D.P.R. 68, does not enter into this question, nor does the opinion of the Secretary of Justice issued on October 3, 1966, opinion #50, which referred to the publication of the regulations. This Agency having concluded that the written communication of Manager Atiles Moreu in 1954 was an internal interpretive order and not an amendment to the Regulation or a rule of those commonly called legislative, we concluded then, that it was not necessary that said administrative norm or practice be filed in the Office of the Secretary of the Department of State pursuant to Act #112 hereinbefore cited, since the same law states that it is not necessary to file before said Department the internal administrative orders of an agency and we understand, in the light of the hereinbefore discussed, that the interpretive rules which are opinions and administrative practices do not require their filing in the Department of State pursuant to Act #112 of June 30, 1957. Wherefore we conclude that the approval of this law in no way affected the administrative norm in effect of collecting the premium from a maximum basis of $5,200.00. *U.S.* vs. *Aarons*, 310; F 2d 341; *Brownell* vs. *Schering Corp.*, 129 F Supp. 879, cert denied, 351 U. S. 954.

PART H: *Retroactivity of administrative decisions; the doctrine of estoppel: Its constitutional limitations:*

Internal memorandum 147-69 issued by the then Manager, Ramón A. Rivera Rivera had the purpose of nullifying the administrative practice observed until that moment

and it went into effect commencing the 1st day of October 1969.

As we have pointed out previously, the practical effects of that memorandum started to take effect during the year 1975, when the employers were really notified of the deficiencies incurred for non-compliance with said memorandum. Said deficiencies were made retroactive to 1969, at which time the memorandum in question was promulgated. Let us see, then, the validity and efficacy, if any, which said internal memorandum 147-69 had and its juridical effects. Article 26 (11 L.P.R.A., Sec. 27) provides that at the termination of each *economic year* the Manager shall compare the payroll of each employer who pays premiums in accordance with this law, with the preceding economic year which served as a basis for assessing, levying and collecting the premiums and when a difference arises in favor of the State Insurance fund, it shall collect such difference in *additional premiums* in the same manner and *on the same basis* as the original premiums were assessed, levied and collected.

In accordance with said Article 26 the Manager must utilize the same basis he used to assess, levy and collect the original premiums to determine the additional premiums, this same basis shall be identical to that which was used the preceding year which served as a comparison. In other words, the basis for computing the additional premiums during the economic year 1969-70 shall be the basis which was used during the economic year 1968-69, which on that date had a maximum level of $5,200.00; therefore any action of the Manager is void which tends to vary the basis upon comparing the intervened economic year with the preceding economic year which serves as a starting point. At this time it is necessary to define what the law understands as rate and base.

Subchapter 19-2, Chapter 1 of Title 11 of the Rules and Regulations of Puerto Rico define it as follows:

"Rate is the unit of premium for each $100.00 of payroll, except in those cases in which the contrary is specifically provided."

Subchapter 19-4-, Chapter 1 of Title 11 of the Rules and Regulations of Puerto Rico, define in its paragraph (a) the basis for the premium:

"The premium, unless the contrary is provided in this manual, shall be calculated on the basis of the remuneration, that is, of the payment in terms of money with the services rendered are compensated, in accordance with the contract of lease of the services, and shall include the value of maintenance, shelter or other similar benefit."

In other words, in every review of a payroll statement to determine, assess, impose and collect the corresponding premiums there enter into effect 2 factors:

1. The total amount of the payrolls of the employees of the employer, which definition, regulation and control are in the hands of the Manager, even though the number of employees and their remuneration are in the hands of the employer.

2. The factor of the rate of premium hereinbefore defined and which in accordance with the law is promulgated annually. (Article 22, 11 L.P.R.A., Sec. 23).

Upon reviewing the premiums the Manager shall promulgate the lowest possible ones, consistent and in harmony with the following criteria and factors:

1. The criteria of the actuary.
2. The necessity of keeping the State insurance Fund solvent by the maintaining of a reasonable surplus.
3. Said reasonable surplus shall be determined after the deduction and consideration of expenses and costs in-

curred by the Fund by the payment made of every legitimate claim as a result of injury or death taking into consideration, furthermore, the future projections of expenses and costs which said claims filed before the Fund at the moment of promulgating the premium rates which can be charged in the future.

4. The administration expenses of the Fund as well as of the industrial Commission, also as well as any other expense which by law the Manager of the State Insurance Fund is obligated to put into effect. (11 L.P.R.A., Sec. 23, third paragraph).

When the Manager issued his memorandum # 147-69 in reality he was changing one of the factors, the basis on which to compute the rate to determine the premium, therefore we should determine whether said act was one within the faculties in law that the Manager had; and in like manner, if it was a reasonable one which complied with that minimum guarantee of due process of law.

Article 23 (11 L.P.R.A., Sec. 24) provides that:

"The Manager of the State Insurance Fund making use of the powers and the discretion which are hereby conferred upon him before June 1 of each year, he should prepare a schedule of classifications according to the occupations or industries referred to in this chapter. He should also fix for each class of occupation or industry *the lowest possible premiums including minimum premiums, which are consistent with the establishment of a solvent State Insurance Fund and the creation of a reasonable surplus.*

The Manager of the State Insurance Fund should revise the schedule of classifications provided in the preceding paragraph, which in his judgment, should be revised before July 1, 1936 and thereafter every year. Such a revision shall be made in accordance with the

information accumulated in the practice of insurance which took place since this chapter went into effect until December 31 of the preceding year and in accordance with that other experience incidental and in relation to the dangers and risks of the insurance in the classification to be revised." ((Emphasized supplied)

Article 25 (11 L.P.R.A., Sec. 24) provides that:

"... the policies shall be issued on the basis of the total payroll of the activities of the employer and as it shown by his accounting books, payrolls, records or other bona fide documents ...

The Manager of the State Insurance Fund is hereby authorized and empowered to assess and levy on every regular or permanent employer of workmen and employees affected by this chapter, and he is ordered to assess and levy annual premiums determined in accordance with the preceding section, on the total amount of wages paid by employer to workmen and employees who were or would have been entitled to the benefits of this chapter, during the year prior to the levying of the premiums ..."

"The premiums for regular or permanent employers shall be levied as soon as the payroll return hereinafter referred to is received in the Office of the Manager, the *basis therefor*, subject to investigation and revision by the employer for wages, salaries and other compensation paid to the laborers employed by him during the previous year and who were or would have been entitled to the benefits of this chapter." (Emphasis supplied)

Article 26 (11 L.P.R.A., Sec. 27) provides that:

"At the end of each fiscal year, the Manager shall compare the payroll of each employer paying premiums

in accordance with this chapter for such fiscal year, with the payroll of the preceding fiscal year on the basis of which the premiums were assessed, levied and collected; and if the payroll for the year during which the insurance was effective is greater than that of the previous fiscal year for which said premiums were assessed, levied and collected, the Manager shall assess and levy and shall collect, on the difference, as provided in this chapter, additional premiums in the same manner and on the same basis as the original premiums were assessed, levied, and collected; and if the payroll for the year during which the insurance was effective is less than that of the previous fiscal year for which the premiums were assessed, levied and collected, the Manager of the State Insurance Fund shall refund or credit without interest or discounts from the State Fund the proportion of the premiums corresponding to the difference between the actual payroll for the year during which the insurance was effective, and the year for which said premiums were assessed, levied and collected, if the Manager can verify to his full satisfaction that the wages, salaries and other remunerations declared by the employer in the statement or report hereinafter provided for have been correctly stated."

In accordance with the provisions transcribed above it is imperative to conclude that the Manager is empowered to compute the basis which will determine the premiums to be paid in accordance with the total payroll of the wager or other remunerations which the employer pays to his employees, but having determined beforehand that by an administrative interpretation the Manager determined that the total payroll to be paid per employee was up to a maximum of $5,200.00, it remains therefore to be analyzed whether it was reasonable that the administrative criteria be changed from what the total payroll meant in 1969 as

was done and if said change in the administrative norm complied with the minimum guaranty of due process of law or whether the Manager was prevented from doing so.

It is necessary to point out that the employer did not intervene in the administrative interpretation given by the Manager in 1954 with respect to the total payroll which the employer was obligated to pay per employee. The employer in good faith trusted the administrative interpretation and deposited his confidence in the subsequent actions of the Manager upon collecting, liquidating and expediting the policy in accordance with said interpretation.

The cases of *Monllor & Boscio* vs *Comisión Industrial*, 39 D.P.R. 397 and *Ready Mix Concrete* vs. *Comisión Industrial*, 92 D.P.R. 37 are not inconsistent with the position we presently adopt, as a matter of fact both complement our theory that the Manager is empowered by law to promulgate reasonable norms in accordance with the procedure established by our law and is empowered to interpret the same, whether it be a sentence, a concept or a statutory provision, provided that it is in agreement not only with the purposes of the law hereinbefore cited and its historic development, but also with the meritorious judicial interpretation related with any aspect of the law. As a matter of fact in the opinion of *Ready Mix*, supra, the fact is recognized that flexible rules were established by which the administrative agency could adopt regulations to evaluate reasonably, justly and fairly the capacity of the workman to earn his income, with the purpose of not only levying the employer's premium, but also to fix a just compensation for the employee who suffers a job accident.

In other words, in this case it is recognized that the Manager is empowered to promulgate interpretive rules.

In *Monllor & Boscio*, supra, on page 404 it is pointed out that:

> "By provision of said regulation, the premium *unless otherwise provided therein*, shall be calculated on the basis of remuneration, that is, from the payment in terms of money with which the services rendered are compensated in accordance with the lease contract of the services and shall include the value of maintenance, shelter or other similar benefit." (Emphasis supplied)

The Manager in his memorandum emphasizes to us that the premiums collected by the State Insurance Fund are taxes (contribuciones) by virtue of the dictum emitted by our highest Court in the case of *Municipality of Carolina* vs *Caribbean Atlantic Air Line, Inc.*, resolved on February 12, 1974, Ref. Col. Abog. (Bar Ass'n), 1974-16, which points ou the following on page 7:

> "Since the tax (contributión) is levied on the net income which is received during the year, and that money is a personal property of the taxpayer, the legislator considered it necessary to exclude that tax from the exemption; and (2) with respect to the premium for indemnification to workmen there occurs substantially the same. The premiums collected to maintain the state fund to cover industrial accidents, has been sustained that they constitute taxes."

To sustain this dictum our highest Court cites the definition of the term tax given by the late Presiding Justice of the Supreme Court of the United States, Mr. Hughes, when he was associate justice, which definition is as follows:

> "Taxes are levied to pay for public expenses. They are fixed on a rule of apportionment pursuant to which the persons or property encumbered share the public burden and whether the assessment covers all those within the state, or whether those belonging to a specific class or locality, its essential nature is the same."

The Manager maintains, furthermore, that the tax levied upon the employer is based on the amount in dollars and cents of the payroll corresponding to the wages paid to all of its workmen and employees. We are not in accord with the position of the Manager and we understand that what was said by our highest court in the case of *Municipality of Carolina,* supra, does not go beyond a mere 'dictum' which does not revoke the statement made in the case of *Esso Standard Oil* vs *A.P.P.R.* 95, D.P.R. 772, 784-785 wherein it is pointed out that:

> "Section 2 of Article 6th of the Constitution of the Commonwealth provides that the power of the Commonwealth of Puerto Rico to levy and collect taxes and to authorize their imposition and collection by the municipalities shall be exercised as provided by the Legislative Assembly *and shall never be surrendered or suspended.*" (Emphasis in the original)

". . . From the law itself it is to be inferred that the Legislative Assembly proposed to authorize the imposition of a right, because that was the only way to make the Ports Authority self-sufficient but that right was not imposed by the introduction, sale or consumption of aviation gasoline in Puerto Rico, but by the gasoline supplied by the suppliers that operate in the airports (sic). It is the fact of supplying the fuel in one of the airports of the Ports Authority the event that generates the imposition and collection of the right . . . Its juridical nature is therefore different from the tariff or tax it replaced. The right in question is a charge which for the use of the facilities provided by the Authority is levied under Article 6(L) of Act # 125 of May 7, 1942 (23 L.P.R.A., Sec. 336 (L) and by special authorization of the Legislative Assembly.

" . . . Taxes are levied for the exclusive purpose of generating income. In this case the right is not aimed at that purpose but to produce income for a public

> instrumentality for the necessary and adequate financing of its purposes and aims."

In the cases we have under discussions like that which occurred in *Esso Standard Oil,* supra, the premiums are not directed to that purpose but to produce income for a public instrumentality for the necessary and adequate financing of its aims and purposes by express authorization of the Legislative Assembly. (11 L.P.R.A., Sec. 1 et seq.).

The proceeds of the premiums collected by the Fund enter into the special funds of that agency to make possible its financing; it does not constitute income of the state of municipality (*National Cable Television Ass'n* vs *and F. C.C.* (1971), 39 L ed 2d, 370, 376; *F.P.C.* vs *New England Power Co.* (1974), 39 L ed 383, 388).

It is important to determine whether or not the premiums paid by the employers are a tax, since if it is determined that it is a tax, we must necessarily accept the validity of its validity *prima facie* by virtue of the power of the state to levy taxes for the purpose of generating income to pay for the public expenses.

Pursuant to what has been hereinbefore expressed, we conclude then that the amount of money which the employers pay to the Fund at premiums are not taxes and enjoy the juridical nature of a fee which the employers pay for services and protection received.

The Accident Compensation Law upon decreeing a monopoly on the part of the state as exclusive insurer permits the creation of a contract of assent between the insured and the Fund. It is known that the contract of assent presents the phenomenon of a reduction to a minimum of the contractual bilaterality. 3 Castán—Spanish Civil Law, common or statutory 332-334 (Eighth Edition of the Reus Editorial Institute of (1954); see also: II-Volume I Puig Brutau—Fundamentals of Civil Law, 303-304 (Edition of the

Editorial firm Bosch of (1954); *Maryland Casualty Co.* vs *San Juan Racing Ass'n., Inc.*, 35 D.P.R. 559, 566).

The Manager upon decreeing premiums and imposing retroactive deficiencies upon the employers is subject to the provisions of the statute, the regulation and the common right, including the equity. Since the position of the employer in said insurance contract is limited and subordinated to the power of the government instrumentality exercised by its Manager, he no longer has an absolute discretionary power to issue and make retroactive decisions, and the discretion he has, like all discretions, should not be used in an arbitrary and unreasonable manner.

It has been said that the constitutional provision with respect to ". . . no laws will be approved that impair the contractual obligations", is not absolute. (*Sierra* vs. *San Miguel* 70 D.P.R. 604; *Hudson Water* vs. *McCarter*, 209 U.S. 349).

Even so the power of regulation as wide as it may be is not unlimited, its exercise can never be arbitrary or unreasonable. (*E.L.A.* vs. *Márquez*, 95 D.P.R. 393).

Reasonable cri'eria to determine the validity of an administrative or legislative action are the same whether under the guaranty of due process of law as under the guaranty against impairment of contractual obligations. In the case of *Warner Lambert* vs. *Tribunal Superior* (Superior Court), *Santaella Bros.*, Intervenor, resolved on May 9, 1975, Ref. Col. Abog. (Bar Ass'n); 1973-56, there is stated the principle of reasonability and that of certainty in the legal consequences of what has been agreed upon and the social value that the stability of contractual relations has.

In *Warner Lambert*, supra, it is pointed out that the certainty in the legal consequences of what has been agreed upon constitutes the rational basis on which is based the guaranty against the impairment of contractual obligations.

Establishing that the stability of contractual relations is a social value which requires protection in the judicial order, *only for extraordinary reasons of public order*, can this protection remain subordinated to the power to regulate of the state. Thus, it has been determined that in matters involving the health of human beings it constitutes an extraordinary reason of public order which can negate the requirements of due process of law, of notification and prior hearing. (*North American Cold Storage Co.* vs. *Chicago*, 211 U. S. 506; *Certify Color Industries* vs. *Secretary of Health*, 283, F.2d 622 (2d Cir. (1970)).

The constitutional guaranty that:

". . . no person shall be deprived of his liberty or property without due process of law . . ."

Has the effect of extending the requirement of due process of law to all types of exercise of governmental power. (*Union Bridge Co.* vs. *U. S.* 204 U. S. 364; *Chicago R. & Q. R.* vs. *Illinois* 200 U. S. 561; *Kennedy* vs *Mendoza Martiez*, 572 U. S. 144; *N.A.A.C.P.* vs *Alabama*, 372 U. S. 288).

Notification and hearing constitute one of the essential requirements of the due process of law. (*Anderson National Bank* vs *Lackett*, 521 U. S. 551; *Snyder* vs *Massachusetts*, 291 U.S. 97).

It is to be noted that in the case of *Anderson National Bank*, supra, it has been determined that the notification given to the depositors in the cases of inactive bank account for more than 5 years declared judicially abandoned, meet the requirements of the due process of law using as a basis that the notification procedure was so old that it had been converted into a well-known custom by the community and that this deserved great weight in the determination of whether it complied with the due process of law. The importance of this is based on the fact that the Constitution does not require formality nor technicality in the notifica-

tions, the latter can be made by any means, provided that the method used is reasonable and clearly the persons to whom they are addressed have the opportunity to receive them or know them, giving them an opportunity to prepare themselves and an adequate opportunity to be heard.

This in brief are the main points of the doctrine of the due process of law at the administrative agency level. The public hearing required by the due process of law should be before the competent authority at any stage *prior* to the administrative determination which effects the depriving of life, liberty or property of the person or entity subject to regulation. (*Phillips* vs *Commissioner of I.R.*, 283 U.S. 589; *North Laramie Land Co.* vs *Hoffman*, 263 U.S. 276, Japanese Immigrant Case (*Yama Caya* vs *Fisher*, 189 U. S. 86; *López* vs *Junta de Planificación*, 80 D.P.R. 646; *Bonocio Román Cancel* vs *Gerardo Delgado*, 82 D.P.R. 598; *Goldberg* vs *Kelly*, 597 U. S. 254).

In the cases involved herein, the employers learn for the first time of the change in the administrative norm in the enforcement stage of said norm.

There is lacking, therefore, the reasonable procedure of notification and hearing by the employers who will be affected by said administrative determination which changes unilaterally the established practice by virtue of Bulletin 147-69, without notifying or giving explanations to the employers. (*North Laramie Land Co.* vs *Hoffman*, 268 U. S. 276, 282-283; *Briscoe* v *Kusper*, 435 F 2d 1046 (1970)). It is a well known rule that the due process of law does not suppress, create or expand powers. (*Kinsella* vs. *U. S.*, 361 U. S. 234, 246). With respect to this see the case of *United States ex rel. Toth* vs. *Quarles*, 350 U. S. 11, which dealt with a soldier who had been tried by a court martial after he had been discharged from the Army for a crime committed before his discharge. It was stated in this case that the provisions of Clause 14 by themselves did not empower

the Congress to deprive persons of a trial under the protection of the Bill of Rights of the Constitution.

This Agency cannot expand nor diminish the constitutional powers, whether it be by applying them on a case to case basis or upon balancing the constitutional powers granted to it by the Constitution of our Legislative Assembly not in conformity with the protected interests and rights which exist in the Bill of Rights of our Constitution in favor of the citizens of this country. What we should avoid when resolving these cases is: the negation of justice, equity and reasonableness which move the universal sense of justice (*Betts* vs *Brady*, 316 U.S.

The action of the Manager of the cases under discussion, do not comply with the thought hereinbefore transcribed and is a negation of the same. At this moment the doctrine stated by our highest Court in the case of *Silva* vs *Comisión Industrial*, 91 D. P. R. 391 is applicable wherein citing the extraordinary commentator Puig Brutau, on page 904 points out:

> ". . . he who has participated in a deceitful situation cannot pretend that his right prevails over and above the right of he who has deposited his confidence in that appearance."

Previously the prevailing doctrine was that the State was not prevented from carrying out certain determined acts which could provoke the allegation of the doctrine of estoppel, *Federal Crop Insurance Corp.* vs *Merrill*, 332 U. S. 380, 385, wherein Justice Frankfurter pointed out that:

> "Men must turn square corners when they deal with the Government."

Even though this opinion does not illustrate the exact position of the common American right which governs this topic, it does reflect the lack of consideration of the judicial

system toward a citizen who performs an act by virtue of a representation of an agent of the State and is trapped in the expression that the State cannot be impeded by the acts of its agents (15 Words & Phrase 561, (1950); 31 C. J. S. 419 (1942)).

This principal has been overcome and in Puerto Rico the application of the doctrine of estoppel to government agencies is recognized. (*García Colón* vs. Secretary of the Treasury (*Secretario de Hacienda*), 99 D. P. R. 779 (1971); as well as in the Federal sphere. *United States* vs. *Pennsylvania Chemical Co.*, 411 U.S. 655.); cf. Dixon vs. U. S. 381 U. S. 68 (1965)).

In *García Colón*, supra, it is pointed out on page 735 that the State, as well as a corporation, is a juridical figure which is made up of persons, assets, rights and duties, but by necessity it must act and does act through persons who are their agents and citing Castán the Court points out that:

> "If we are not to move within a sterile concept of pure normativism, the ideas of justice and equity are essential and consistent with the notion of law, which should fulfill its social and moral aims if it expects to achieve justice, and not an abstract or theoretic justice but a real and humane justice in accordance with the circumstances of each case."

When the State makes an agreement with natural or juridical individuals of society, it strips itself of its sovereign character insofar as that particular transaction is concerned and takes on the character of an ordinary citizen and is subject to the same laws that govern individuals in the same circumstances. (*U.S.* vs *A. Bentley & Sons Co.*, 293, 235 (S.D. Ohio 1923); *U.S.* vs. *Georgia-Pacific Co.*, 421 F 2d 92 (9th Cir. (1970)). With respect to this see 2 *Davis Administrative Law Treatise*, (1958), Sec. 17 et seq.

In the case under consideration the Fund enters into a monopolistic economic activity of insurance in which the Fund acts as exclusive insurer of the employers. It is a compulsory and exclusive insurance for certain specified risks (job accidents and occupational sickness) and by virtue of which annually it issues a policy covering the employers by the payment of the corresponding premiums. In this capacity it is necessary to treat the government instrumentality as a common everyday citizen with respect to its contractual relations with the employers. It is an undisputed fact that the Manager accepted the payroll statements prepared by the employers between 1954 and 1972 in accordance with the prevailing administrative practice, liquidated the premiums to be paid in accordance with the same and never questioned the validity of the policies issued. It cannot go against its own acts, it cannot do so in law nor in equity. (*Silva* vs. *Comisión Industrial*, 91 D. P. R. 891, 904). With respect to this see the work of Professor Frank C. Newman, Volume 53, Rev. Jur. Columbia University, page 374.

Had there been any error, and there was none, in the interpretation made by Manager Atiles Moreu, of the concept of the 'total payroll' the employers who acted in good faith could not be penalized.

The juridical nature of this contract is one of insurance. (*Miró* vs. *Comisión Industrial*, 57 D. P. R. 28 (1940)). Any interpretation that is made of the same and of any action of the Manager shall be in a restrictive manner against the insurer and in favor of the insured, this is not different in the cases in which the insurer is the State (*Pedro León Ortiz* vs. *Comisió Industrial*, resolved on October 31, 1973, review petition number O-71-75).

In our case, furthermore, there arises a presumption 'juries tantum' that the Manager upon fixing the *rates* of premiums during the years 1954 to 1969 took into consideration the limitation there was on the basis of $5,200.00 to

comply with the legislative mandate to maintain the Fund solvent, with a reasonable surplus maintaining in turns the lowest possible premiums consistent with the legislative mandate. In other words, the premium rates applied during that period were the result of certain criteria which were used *as one of the* factors, the existing administrative practice of setting a basis of $5,200.00 per year, maximum remuneration per workman or employee, in each class of occupation or industry which originated an income which was sufficient to comply with the legislative mandate of a reasonable surplus to maintain the solvency of the Fund. (*Ready Mix Concrete* vs *Comisión Industrial*, 92 D.P.R. 37).

In accordance with what has been hereinbefore stated we conclude therefore that the action of the Manager in 1975 of notifying certain deficiencies retroactive to the year 1969 by virtue of memorandum number 147-69 was unreasonable and arbitrary, repugnant to the most sensitive sense of justice which should permeate the actions of administrative agencies, the result of the delegation of powers made by our people through its Legislative Assembly for the purpose of resolving social relations among its members and those of the latter with the State selected for governmental purposes.

Furthermore, it is concluded that the Manager was impeded from notifying the corresponding deficiencies based on the change of administrative norm or practice because said action did not comply with the minimum requirements of the due process of law of notification and hearing.

Woe be to him who succumbs before the might of the governing officials; the result would be tyranny, oppression, persecution and the suppression of ideas. Only the courts can serve as watchtower and defender to prevent those consequences.

In a world of present-day complexities the scalpel of justice is necessary to prevent the agony of the mind and social values: which lead to collective schizophrenia of a society doomed to failure which does not learn the lesson of history. One must, therefore, protect the social stability and its values by the power of the tongue, the shield of the word and the banner of truth and honesty with the strongest purpose of handing out justice for the sake of justice itself.

Conclusions of Law

1. The Workmen's Accident Compensation Law is the product of the legitimate constitutional authority of the legislative power to promote the protection of the life, health, safety and personal integrity of the workmen, employees and inhabitants in general of Puerto Rico.

2. The legislative purpose which permeates the law is to maintain a solvent fund with a reasonable surplus which is consistent with the imposition of the lowest possible premiums upon the employers.

3. That the written communication of the Manager, Atiles Moreu, dated August 6, 1954 was in the nature of an interpretive rule which defined for the purposes of the implementation of the law, the meaning of 'total payroll' and the 'totality of the wages earned'.

4. That said interpretive rule put into effect, complied with and was compatible with the legislative purpose of maintaining the premiums as low as possible consistent with the solvency of the Fund and a reasonable surplus therein.

5. That since the written communication issued by the then Manager Atiles Moreu was an interpretive rule, it was not necessary that said norm be filed with the

Office of the Secretary to State, pursuant to Act # 112 of June 30, 1957 known as the "Law regarding Regulations of 1958."

6. That the amounts of money paid by the employers to the Fund are not taxes (contribuciones), and they are insurance premiums.

7. That notification and hearing constitute one of the essential requisites of the due process of law, it being imperative that there be presented before the competent authority at some stage, *prior* to the administrative determination which carries out the depriving of life, liberty or property of the person or entity subject to regulation. The action of the Manager in 1969 setting aside the administrative norm, does not comply with these requirements and is a negation thereof.

8. That the Manager upon accepting the payroll statements prepared by the employers during those years, in accordance with the prevailing administrative practice, liquidated the premiums to be paid in accordance with the same and never questioned the validity of the policies issued, originated a situation based upon his own acts which motivates that it is prohibited by law and in equity to go against his own acts, which produces the result that he cannot notify any deficiency, based on the change made in the norm.

WHEREFORE, the Industrial Commission RESOLVES to admit the petitions for review filed by the different employers before this Agency and by VIRTUE thereof nullifies the actions of the Manager of eliminating the maximum limit of $5,200.00 on individual wages subject to the payment of premiums for the period comprised between the fiscal years 1969-70, 1970-71, 1971-72 and 1972-83, and as a result nullifies also the collection of additional premiums required for said period by the Manager, he being obligated to return

to said employers the corresponding amounts which have been collected in excess of the maximum limit of $5,200.00 and in addition, sets aside any notification of deficiency made by virtue of the elimination of the maximum limit of $5,200.00 on the individual wages of the employees of said employers.

In San Juan, Puerto Rico, this 27th day of December 1974.

MIGUEL A. LOPEZ RIVERA
Chairman

Concurrents:

FERNANDO MARTINEZ VELEZ
President

HERMINIO CONCEPCION DE GRACIA
Commissioner

EDWIN RAMOS YORDAN
Commissioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1563

COCA COLA BOTTLING COMPANY
OF PUERTO RICO, INC., et al., *Appellants*
v.
JOSE M. ALONSO-GARCIA, Manager,
STATE INSURANCE FUND OF PUERTO RICO, *Appellee.*

On Appeal from the United States District Court
For the District of Puerto Rico

MOTION TO DISMISS OR AFFIRM

HECTOR A. COLON CRUZ
Solicitor General

ROBERTO ARMSTRONG, JR.
Deputy Solicitor General of the Commonwealth of Puerto Rico

AMERICO SERRA
Assistant Solicitor General
P. O. Box 192
San Juan, Puerto Rico 00902

Attorneys for Appellee
José M. Alonso-Garcia

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1563

COCA COLA BOTTLING COMPANY
OF PUERTO RICO, INC., et al., *Appellants*

v.

JOSE M. ALONSO-GARCIA, Manager,
STATE INSURANCE FUND OF PUERTO RICO, *Appellee.*

On Appeal from the United States District Court
For the District of Puerto Rico

MOTION TO DISMISS OR AFFIRM

TO THE HONORABLE COURT:

Now comes appellee José M. Alonso-García and respectfully moves this Honorable Court to dismiss the appeal in the above-entitled case on the grounds that the cause is moot, or to affirm the judgment and order of the Three-Judge Court of the United States District Court for the District of Puerto Rico on the grounds that it is manifest that the questions presented by the appeal are so unsubstantial as not to warrant further argument.

STATEMENT OF THE CASE

On the year 1954 the then Manager of the State Insurance Fund of Puerto Rico adopted the norm of imposing to employers premiums on the basis of maximum annual wages of $5,200.00 per employee.

Fifteen years later, on October 2, 1969, the then Manager of the State Insurance Fund declared inoperative said administrative practice and instructed that from October 1, 1969 said basis of $5,200.00 be eliminated and that the premiums be assessed, imposed and collected in accordance with the total payroll of the salaries, wages and other compensation which the employee may receive. No publicity was given to this new norm and the employers did not have any knowledge of it until the year 1973.

An investigation of the books of the employers revealed that they were not informing in their payroll statements the total of wages and other compensations earned by their employees. Accordingly, in 1973 the Manager of the State Insurance Fund notified the employers with deficiencies consisting of premiums not paid on salaries in excess of $5,200.00 per year. These deficiencies were made retroactive to the period comprised between 1969 to 1973.

The employers (herein appellants) appealed to the Industrial Commission of Puerto Rico pursuant to the provisions of Section 24 of Act No. 45 of April 18, 1935 known as the "Workmen's Accident Compensation Act" (11 L.P.R.A., sec. 25). Pursuant to said provisions, the employers must deposit the contested amounts in order to gain access to the Industrial Commission and litigate whether or not the amounts are due.

While the litigation before the Industrial Commission was in progress, on May 16, 1973 appellants filed in the United States District Court for the District of Puerto Rico a complaint for declaratory and injunctive relief and for designation of a three-judge court. In said action appellants challenged the constitutionality of the procedure established by 11 L.P.R.A., Sec. 25, on the grounds that it denies the employers any "preterminate" hearing on its obligation to pay the contested amounts and constitutes a deprivation of property in violation of the due process clauses of the 5th and 14th Amendments of the Constitution of the United States. It was also alleged that the said Act does not provide for the posting of a bond in lieu of the contested amounts of premiums, and that such amounts are not returned to the employers if they eventually prevail but rather applied to premiums for subsequent years, without payment of interest.

On December 27, 1974, the Industrial Commission of Puerto Rico issued a resolution deciding that appellants were not required to pay premiums on salaries in excess of $5,200.00 per year. (Appendix to Jurisdictional Statements, pages 37a to 79a). The Manager of the State Insurance Fund requested reconsideration and through a Resolution issued on June 18, 1975, the Industrial Commission reversed its prior judgment and determined that employers were required to pay premiums based on the total amount of each employee's salary.[1] (See Appendix to this Motion.) Appellants requested a review to the Supreme Court of Puerto Rico,

---

[1] Although the June 18, 1975 resolution is titled "Dissident Resolution", it is actually the majority's resolution since three commissioners agreed on it and only one commissioner dissented.

which on August 21, 1975 agreed to review the judgment of the Industrial Commission.

Meanwhile, on June 5, 1975 a three-judge court was designated in the United States District Court for the District of Puerto Rico pursuant to 28 U.S.C., Sec. 2281. On June 25, 1975 a hearing was held before the Honorable Juan R. Torruella, United States District Judge for the District of Puerto Rico, in regard to an order to show cause why a temporary restraining order should not issue against defendant (herein appellee) pending a final determination by the three-judge court. At that hearing the District Court heard the testimony of Samuel Batista, Actuary of the State Insurance Fund. The case was finally submitted to the three-judge court on or around December 2, 1975.

In the meantime, the Supreme Court of Puerto Rico, on April 7, 1976, decided appellants' claim in regard to the payment of premiums on wages in excess $5,200.00 annually. The Supreme Court determined that the rule established in 1954 by the then Manager of the State Insurance Fund has no effect whatsoever because it is contrary to the clear provisions of the Workmen's Accident Compensation Act which expressly provides that the premiums shall be levied on the basis of the total amount paid by the employer for wages, salaries and other compensation during the previous year. Nevertheless, the Supreme Court remanded the case to the Industrial Commission so as to allow the Manager of the State Insurance Fund to determine again the *rate* which will govern each occupation or industry as of the year 1969. (See Appendix to this Motion.)

Finally, on December 27, 1976, the United States District Court for the District of Puerto Rico filed a

judgment and opinion denying appellants' constitutional challenges arising from the disputes concerning the premiums charged by appellee herein. The District Court held that the case came within the express exceptions sketched in Part VI of *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), and that the collections of premiums here "resemble nothing so much as the collection of taxes, for which *Fuentes* makes an explicit exception". (Appendix to Jurisdictional Statement, page 4 a)

On January 7, 1977, appellants filed a motion to alter or amend judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, requesting a reconsideration of the District Court's statement that the workmen's compensation premiums resemble taxes. On February 8, 1977, the District Court denied the petition for rehearing, stating that it had not decided that the premiums were taxes for purposes of Puerto Rican law or for any other purpose, and that it had "simply held that the governmental interest in collecting these premiums is identical to that in collecting taxes and, for this reason, the *Fuentes* exception applies". (Appendix to Jurisdictional Statement, page 1 a).

ARGUMENT

I

The Cause Appealed Is Moot

Appellants' claim against the State Insurance Fund in regard to the contested premiums not paid on salaries in excess of $5,200.00 annually per employee was finally and definitively adjudged and decided by the Supreme Court of Puerto Rico on April 7, 1976. It is thus apparent that the issues sought to be raised in this appeal about the alleged unconstitutionality of the

Workmen's Accident Compensation Act are moot because there is not a live controversy at this moment. The final adjudication of appellants' claim by the Supreme Court of Puerto Rico put an end to the case or controversy in this lawsuit, for there is no current or continuing prejudicial injury to appellants' proprietary rights, and any decision by this Honorable Court on the questions sought to be raised will have no effect whatsoever on appellants' claim against appellee. See *Indiana Employment Division* v. *Burney,* 409 U.S. 540, 35 L.Ed. 2d 62, 93 S. Ct. 883 (1973); *SEC* v. *Medical Committee for Human Rights,* 404 U.S. 403, 30 L. Ed. 2d 560, 92 S. Ct. 577 (1972); *Sosna* v. *Iowa,* 419 U.S. 393, 42 L. Ed. 2d 532, 95 S. Ct. 553 (1975).

II

The Questions Presented by the Appeal Are So Unsubstantial As Not To Warrant Further Argument

The decision of the District Court is plainly correct. Appellants' assertion that the District Court erred in equating the collection of premiums with the collection of taxes notwithstanding the holding of the Supreme Court of Puerto Rico in *Wirshing* v. *Buscaglia,* 64 P.R.R. 346 (1945) and the decision of the Industrial Commission, is clearly without merit. What *Wirshing* v. *Buscaglia,* supra, actually holds is that premiums on workmen's compensation insurance are not taxes *which can be paid under protest and recovered through an ordinary action* in a local district court pursuant to a local statute providing for the payment of taxes under protest. In *Municipality of Carolina* v. *Caribbean Atlantic Airlines, Inc.,* decided on February 12, 1974, 101 P.R.R. (1974), (Appendix to this Motion), the Supreme Court of Puerto Rico held that premiums collected for the support of the state industrial accident fund are taxes. See also *Esso Standard Oil* v. *P.R.P.A.,* 95 P.R.R. 754 (1968); and *Boyd, James Harrington,* "A Treatise on the Law of Compensation for Injuries to Workmen", Vol. 1, Section 70.

The Workmen's Accident Compensation Act itself considers the premiums as taxes. See 11 L.P.R.A., sec. 20 and 11 L.P.R.A., sec. 25 (Appendix to Jurisdictional Statement, pages 24 a to 25 a).

On the other hand, the Resolution of the Industrial Commission of Puerto Rico of December 27, 1974, invoked by appellants, was vacated and reconsidered by the Commission on June 18, 1975, and in the Resolution issued on reconsideration the Commission expressed that there was no need to decide whether the premiums imposed by the Manager of the State Insurance Fund are taxes. (See Appendix to this Motion).

In any event, it is clear that the District Court did not decide that the premiums are taxes for purposes of Puerto Rican law or for any other purpose. As the District Court stated in the Order on Petition for Rehearing:

> ". . . We simply held that the governmental interest in collecting these premiums is identical to that in collecting taxes and, for this reason, the *Fuentes* exception applies." (Appendix to Jurisdictional Statement, page 1 a).

Appellants rely mainly on this Court's decisions in *Fuentes* v. *Shevin,* 407 U.S. 67 (1972); *North Georgia Finishing* v. *Di-Chem,* 419 U.S. 601 (1975); and *Sniadach* v. *Family Finance Corp.,* 395 U.S. 377 (1969). Unlike the instant case, the decisions cited by appellants

deal with the area of debtor-creditor commercial relationships. In those cases this Court found unconstitutional commercial statutes designed to afford a way for relief to a creditor against a delinquent debtor, in which ex-parte allegations sufficed to invoke State machinery.

The case at bar is fundamentally different from the cases cited by appellants. Here, as the District Court stated, it is a governmental agency which assesses the premiums and its purpose is a public one. There is no doubt that workmen's compensation acts are constitutionally valid as a just and reasonable exercise of the State's police power, by reason of its public interest in the safety, health, lives and welfare of workers. *Madera* v. *Industrial Commission,* 262 U.S. 499 (1923); *Heirs of Rodriguez* v. *Industrial Commission,* 53 P.R.R. 784 (1938); *Cortés* v. *Industrial Commission,* 85 P.R.R. 231 (1962); *Horovitz On Workmen's Compensation,* 1944 Ed., pages 12-13.

In *Fuentes* v. *Shevin,* supra, this Court said at pages 90-92:

> "There are 'extraordinary situations' that justify postponing notice and opportunity for a hearing. Boddie v. Connecticut, 401 U.S. at 379, 28 L.Ed. 2d at 119. These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was

> necessary and justified in the particular instance. Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food."

In the instant case there is no doubt that the three requisites expressed in *Fuentes* are met. Evidently, the prompt collection of premiums assessed by the Manager of the State Insurance Fund is essential to secure the important governmental and public interest which is the health and welfare of the labor force. Cf. *Calero Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974).

On the other hand, the Workmen's Accident Compensation Act provides for a full and prompt hearing before the Industrial Commission and subsequent review by the Supreme Court of Puerto Rico in the case of any employer aggrieved by a decision of the Manager of the State Insurance Fund fixing premiums or rates. See 11 L.P.R.A., Secs. 25 and 12 (App. J.S., pages 24 a and 22 a). As this Court says in *Mitchell* v. *W.T. Grant Co.,* 416 U.S. 600, at page 611:

> ". . . The usual rule has been '[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate'. Phillips v. Commissioner, 283 U.S. 589, 596-597, 75 L.Ed. 1289, 51 S.Ct. 608 (1931)"

At page 11 of the Jurisdictional Statement appellants assert that *Laing* v. *United States,* 423 U.S. 161, 46 L.Ed. 2d 416 (1976), is authority for the opposite

proposition enunciated in *Phillips* v. *Commissioner*, 283 U.S. 589 (1931), where this Court allowed summary seizure of property to collect the internal revenue of the United States. Appellants' assertion is totally incorrect. In *Laing* v. *United States*, supra, this Court did not address itself to the question whether due process demand that a taxpayer, in a jeopardy assessment situation, be afforded a prompt post-assessment hearing. The Court did not have to decide whether the procedure available violated the Constitution, because it agreed with the taxpayer's construction of the statute. See Note 26 at 46 L. Ed. 2nd 433.

Likewise, appellants wrongly allege that there was no evidence of the State Insurance Fund's fiscal problems. In addition to the study or report submitted by appellee, the District Court heard the testimony of Mr. Samuel Batista, Actuary of the State Insurance Fund. This witness testified that the Fund would lose 11.7 million dollars in premiums in the event that the $5,200.00 payroll limitation be maintained, and that in such event the benefits paid by the Fund would be adversely affected because said benefits come entirely from premium income.

This testimony showed that the State Insurance Fund has only one source of revenue, and that is the amount collected from premiums. A serious financial disability to meet economic obligations would result if this income be delayed, when the financial statements of the Fund show that approximately every dollar coming into the Fund is being spent or obligated in benefits to workers and other operational costs. This factor of societal and financial cost has to be considered as part of the Government's or public interest, when determining the appropriate due process balance. See *Mathews* v. *Eldridge*, 47 L. Ed. 2d 18 (1976); *Boddie* v. *Connecticut*, 401 U.S. 371, 378-379 (1971).

Alcoa Steamship Company v. *Pérez*, 424 F.2d 433 (1970), cited in the Jurisdictional Statement, has nothing to do with the absence of a hearing prior to the collection of premiums by the State Insurance Fund. That case deals only with the right to recovery by an employer of illegally charged premiums, when such an employer is not covered by the Puerto Rico Workmen's Accident Compensation Act.

CONCLUSION

For the reasons above set forth, it is respectfully requested that this appeal be dismissed on the ground that the cause is moot, or that the judgment and order of the District Court be affirmed on the grounds that it is manifest that the questions presented by this appeal are so unsubstantial as not to warrant further argument.

At San Juan, Puerto Rico,

Respectfully submitted.

HECTOR A. COLON CRUZ
Solicitor General

ROBERTO ARMSTRONG, JR.
Deputy Solicitor General of the Commonwealth of Puerto Rico

AMERICO SERRA
Assistant Solicitor General
P. O. Box 192
San Juan, Puerto Rico 00902

Attorneys for Appellee
José M. Alonso-García

APPENDIX

IN THE SUPREME COURT OF PUERTO RICO

Nos. 0-75-340, 0-75-338

Review

COCA COLA BOTTLING CO. OF PUERTO RICO, SEARS ROEBUCK OF P. R., INC., ETC., *et al.*, *Appellants*

v.

INDUSTRIAL COMMISSION OF PUERTO RICO, ETC., *Respondent*

Judgment

San Juan, Puerto Rico, April 7, 1976

Despite the fact that art. 25 of the Workmen's Accident Compensation Act in its second paragraph (11 L.P.R.A. § 26) provides insofar as pertinent that the Manager of the State Insurance Fund is authorized and empowered to assess and levy on "every regular or permanent employer of workmen and employees affected by this Act, and he is hereby ordered to assess and levy premiums determined in accordance with the preceding article, on the total amount of wages paid by said employer to workmen and employees . . ." and in its fifth paragraph it repeats that "[t]he premiums for regular or permanent employers shall be levied as soon as the payroll return hereinafter referred to is received in the office of the Manager, the basis therefore, subject to investigation and revision by the Manager, to be the total amount paid by the employer for wages, salaries, and other compensation paid to the laborers employed by him during the previous year . . ."; in 1954 the Manager of the State Insurance Fund set up a rule fixing an annual ceiling of $5,200 per employee on all salaries, wages, or individual compensation subject to the payment of premiums.

Fifteen years later, on October 2, 1969, the then Manager of the Fund, issued an internal memorandum abrogating

the rule set up in the year 1954; in said memorandum he stated that for the purposes of levying and collecting premiums the total amount of the payroll earned by or paid to all the employees, officers, or workmen of any employer would be taken into consideration, thus eliminating the $5,200 ceiling.

No publicity was given to this new rule and it was not until the middle of 1973 that the employers, appellants herein, learned about its existence.

When the employers' account books were investigated in the year 1973 it appeared, as it was to be expected—since no publicity had been given to the memorandum of October 2, 1969—that the former were not informing the Fund, in the payroll return, the total of wages, salaries, and other compensation paid to its employees; consequently in 1973 the Manager notified them a deficiency which was retroactive to the year 1969.

The employers appealed to the Industrial Commission, which upheld the determination of the Manager of the Fund.[1]

---

[1] The case was submitted to the Industrial Commission in the following stipulation:

"1—That according to the instructions given through an internal communication on August 6, 1954, by the then Manager of the Fund, Guillermo Atiles Moreu, the administrative practice followed for over 15 years was that of levying premiums on a maximum basis of $5,200 of the wages per employee.

"2—That through internal memorandum No. 147-69 dated October 2, 1969, Mr. Ramón A. Rivera Rivera, Manager of the Fund at that time, abrogated said administrative practice and ordered that as of October 1, 1969, the $5,200 basis was to be eliminated and the premiums were to be assessed, levied, and collected according to the total amount of the payroll of the salaries, wages, and other compensation paid to the employees.

"3—That it was not until the middle of 1973, that the employers learned about internal memorandum No. 147-69, to which we have made reference.

"4—That no publicity was given to said memorandum through our news media."

Nobody argues that the Workmen's Accident Compensation Act expressly provides that "[t]he premiums for regular or permanent employers shall be levied as soon as the payroll return is received in the Office of the Manager . . . the basis therefore . . . to be the total amount paid by the employer for wages, salaries, and other compensation paid to the laborers employed by him during the previous year . . ." Consequently, the rule established in 1954 is contrary to law. The fact that it remained in existence for a considerable period of time, does not give validity to the same. A set of rules or an administrative practice which is contrary to the clear provisions of a statute, has no effect whatsoever. In *Ex parte Irizarry*, 66 P.R.R. 634, 638 (1946) we said "It is an elemental rule of law that when the legislature delegates to a board or person powers to promulgate rules, the latter, to be valid, cannot be in conflict with the norms established in the law." And in *Rosario Mercado* v. *San Juan Racing Ass'n*, 94 P.R.R. 605, 614 (1967) we stated that "The text of the law should never be understood as modified or substituted by the regulations." See also, *A.P.I.A.U. Inc.* v. *Sec. of the Treasury*, 100 P.R.R. 171, 177 (1971); *County of Marin* v. *United States*, 356 P.S. 412-420 (1958); *United States* v. *Mo. Pac. R. Co.*, 278 U.S. 269, 280 (1929); *Dixon* v. *United States*, 381 U.S. 68-74 (1965); *Manhattan General Equipment* v. *Commissioner*, 297 U.S. 129 (1936).

The Act also orders to "fix for each class of occupation or industry the lowest possible premium rates, including minimum rates, consistent with the establishment of a solvent state insurance fund and the creation of a reasonable surplus." Article 23 (11 L.P.R.A. § 24). It is evident that pursuant to the express provisions of the act, the Manager

could set up a new rule, which would have the effect of increasing the total amount of the payroll over which the premium for each occupation or industry is levied and, consequently, maintain a low premium rate,[2] complying with the express mandate of the act.

Before June 1 of each year, the Manager of the Fund shall prepare a schedule of classifications according to the occupations or industries and fix for each class of occupation or industry the lowest premium rates possible. In complying with the legislative mandate of fixing the lowest premium rates possible compatible with the solvency of the fund and the creation of a reasonable surplus, the higher the amount of the payroll for each occupation or industry, taking into consideration other actuarial factors, the lower the premium rate could result. See *Quilinchini* v. *Industrial Commission*, 93 P.R.R. 473-477 (1966). Upon changing the rule in effect since 1954 and requiring the return of the total amount of the payroll, there would necessarily have to be a new determination of the premium rate. This being the case, the proper action would be for the Manager of the Fund to determine again the rate which will govern each occupation or industry as of the year 1969. Pursuant to the provisions of art. 24 of the Workmen's Accident Compensation Act, 11 L.P.R.A. § 25, if they feel aggrieved with the Manager's decision, employers may petition the Commission for its review.

The resolution appealed from is reversed and the case is remanded to the Industrial Commission.

It was so decreed and ordered by the Court and certified by the Chief Clerk. Mr. Chief Justice, Trías Monge, disqualified himself.

(Subscription omitted in printing)

---

[2] Rate is the premium unit for each $100 in the payroll.

THE COMMONWEALTH OF PUERTO RICO
INDUSTRIAL COMMISSION OF PUERTO RICO
SAN JUAN, PUERTO RICO

Case No. IC—73-5-3957

73-5-3956

Case No. S.I.F.
Policy No. 3002
Policy No. 2284

COCA COLA BOTTLING CO. OF P.R., SEARS ROEBUCK DE P.R. INC. on their behalf and on behalf of those employers similarly situated in Puerto Rico,

vs.

STATE INSURANCE FUND, *Insurer*.

Re: Revision of Premiums
(Reconsideration)

(Majority's Resolution)

Dissident Resolution

I reconsider my position as to the concurrence of the resolution in the case of caption dated December 27, 1974, notified on January 10, 1974, in which the arbitrator was the distinguished brother attorney Miguel A. Lopez Rivera, Esq., being it my belief that the refund does not proceed but instead the payment of the premiums by the employers in the total of the payroll earned or paid to all officers, employees and workers for the period comprised between the insurance-years 1969-70, 1970-71, 1971-72 and 1972-73, for the following reasons.*

---

* The resolution of December 27, 1974 limited its extent to 1972-73 for all legal purposes.

Article 25 of the Workers' Compensation Law, second paragraph (11 LPRA, Sec. 26), provides in its pertinent part that power and faculty are vested upon the Administrator to appraise and impose to "*any employer*, regular or permanent, of workers and employees affected by this Law, and he is *ordered* to appraise and impose annual *quotas* determined pursuant to the above mentioned Article *on the total amount of the wages paid by said employer* to workers and employees . . ." (emphasis supplied). See also, Paragraph 6th of said Article 25 wherein it is confirmed that the imposition of the premiums' collection shall be made on the total sum of the payroll. Said Paragraph also provides that: "The quotas shall be imposed to regular or permanent employers as soon as the payroll declaration mentioned further on, is received in the Offices of the Administrator, *taking as a basis, subject to investigation and revision by the Administrator, the total amount of wages, salaries* and other gratuities paid by the employer to workers employed by him during the previous year, to which said workers had or may have had the right to the benefits of this Law." (underlining ours).

We also have other clear and specific dispositions in the law as to the matter in controversy, on Paragraph First of Article 27, wherein it is repeated once more the legislative intention that the premium shall be imposed on the total of the wages and other gratuities. In said Paragraph it is expressed that: ". . . and the total amount of the wages paid to said workers."

The preceding legal provisions are clear and specific in their command for the Administrator of the State Insurance Fund to impose and collect premiums taking as a basis the total of the payroll paid by the employers.

Notwithstanding those clear dispositions of law, on August 6, 1954, the then Administrator of the State Insurance Fund, Guillermo Atiles Moreu, Esq., addressed an interoffice communication to the actuary-comptroller of the In-

surance Division of the State Insurance Fund, to which he made reference as an amendment to "Clause B, Section 6 of the Rules and Regulations of the Agency (Handbook of Rules of Classifications and Type of Insurance for Work's Accident Compensation), through which it was established, taking into consideration the salary levels prevailing in Puerto Rico and the limited benefits provided by law (must be understood and interpreted) in cases of accident by that date—August 6, 1954—the norm to fix a maximum limit on the salaries, wages or individual salaries to the premium payment of $5,200 per employee, instead of the total basis of the payrolls paid by the employers in violation of the clear dispositions of law.

From that date and until the year 1969, the Administrator of the State Insurance Fund established the administrative practice or administrative instructions, which for all purposes constitute the same thing, accepting the employers' payroll declarations through which the salaries, wages and other gratuities were limited to $5,200 annually. The payroll declarations were accepted, the premiums were collected on that amount and the corresponding insurance policies issued to the employers.

On October 2, 1969, the then Administrator of the State Insurance Fund, Mr. Roman A. Rivera Rivera, circulated a Memorandum to the Director of the Insurance Bureau, the Head of the Interventions Division, the Head of the Insurance Policy Division, and to the Regional Heads of Policy Liquidations of said Agency, through which he recognizes the administrative practice or administrative instructions of August 6, 1954, above mentioned, and considers that said instructions or administrative practices were never incorporated to the Rules and Regulations of the State Insurance Fund, thereby directing the personnel mentioned in the memorandum to leave without effect from October 2, 1969, the extension of the benefits of Clause (b), Section 6 of the Rule X, to workers and/or employees re-

ceiving an annual salary in excess of $5,200, pointing out further that for the purposes of the imposition and collection of premiums it shall be considered the total of the payroll earned or paid to all officers, employees and workers of any corporation, partnership or natural or juridical person without limitation, that is, eliminating the maximum level of $5,200, maintaining said level for the corporation's executive officers until the new Rules and Regulations are in force.

After the Inter-Office Memorandum No. 147-69 of the Administrator of the State Insurance Fund, the books of the employers are investigated resulting from said investigation that these were not informing to the Fund, in their respective payroll declarations, the total of the wages, salaries and other gratuities earned by their employees. When the collection of additional premiums result from said interventions, the Administrator sends to the employers the Notice for the Collection of Worker's Insurance Premiums, collecting said additional premiums. From the stipulations of the parties* it appears that it is on the middle of the year 1973 that the State Insurance Fund collects for the first time from the employers the premiums for salaries over $5,200, in a retroactive manner for years prior to 1969.

In our opinion, the controversy is limited to determine whether the Administrator of the State Insurance Fund can collect retroactive premiums to all employers over the salaries of $5,200 for years prior to 1973 and specifically for the period comprised between 1954 to 1969, or from 1973 to 1969, when specific administrative instructions are given to the officers intervening with the insurance policies, to the effect that for purposes of imposition and collection

* From Stipulation 3 it appears that during the course of the hearing prior to the public hearing of December 4, the employers did not have any knowledge of the Inter-Office Memorandum #146-69 until the middle of 1973.

of premiums it shall be considered the total of the payroll earned or paid to all officers, employees and workers of any partnership or natural or juridical person without limitation. It was specifically advised that said instructions commenced enforceable on October 1st., 1969.

It is necessary to establish some concepts that in my opinion must be clarified in our Resolution of December 27, 1974, notified on January 10, 1975, for the purpose of establishing our position.

There is no controversy as to what has been discussed in said Resolution on the constitutionality of the "Work's Accident Compensation Law" and all other references to the procedures established by said Law. (Part F.—Discussion and analysis of the law and the theories applicable—Pages 6-10 of the Resolution).

I do not concur with the applicability of the doctrine of the "interpretative rule" for the purposes of determining the validity of the interpretation of the inter-office memorandum of August 6, 1954 issued by the then Administrator of the State Insurance Fund, Attorney Atiles Moreu. In the same resolution it is established the premise that for an "interpretative rule" to be valid it is necessary that some criteria and factors concur (Page 12) and specifically that its applicability must only be effective when there are dubious terms in the law. We do not think we can utilize said rules based on the precise concepts used in the "Work's Accident Compensation Law", of "total amount of the wages paid", the "total payroll payment", "total payroll of activities", "wages paid", "the total amount of the wages", "salaries and other gratuities", and the "total amount of the wages paid", since the same do not require definition. The memorandum of 1954 did not have the extent to define any term but only to limit the payment to $5,200 of the salaries of the employees and workers of any corporation, partnership or natural or juridical person, which was null before the clear dispositions of the Articles

25 and 27 of the Law herein mentioned. There is no interpretation or regulation when the same are not in accordance with the statute. It is settled law that all acts executed in contravention of the law are null. (Article 4 of our Civil Code, 31 LPRA, Section 4). Even assuming that it were a regulation, which is not the case, the legal text can never be understood as modified or altered by the regulations. (*Asociación Puertorriqueña de Importadores deAutomoviles Usados* v. *Sec. de Hacienda*, 100 D.P.R. 173).

In the disposition of our judicial system and the jurisprudence of our Supreme Court, there is sufficient judicial basis to determine the non applicable argument of the theory "interpretative rule" to clarify clear and specific terms requiring no definition nor clarification. (See Article 14 of our Civil Code and cases cited in the work of Attorney Elfren Bernier "Appeal and Interpretation of the Laws of Puerto Rico").

Yet, if we want to make use of authors and precedents of other jurisdictions, we have citations of the distinguished and recognized author Davis in his work "Administrative Law Treatise", saying at Section 5.09:

> "If an interpretative rule is merely an interpretation of a statute, and if the meaning of the statute has been there from the time of it original enactment, then no problem of a retroactive interpretative rule can arise for either the interpretative rule expresses the true meaning of the statute or it does not; if it does, then that is what the statute has always meant and the rule has not changed the law retroactively; if it does not then it does not matter whether the rule can be made retroactive, for the rule is invalid in that it is inconsistent with the statute".
>
> Even when rules are legislative, the Supreme Court has pretended that the formulation of the rules does not involve creative law making. The Court has unrealistically declared: "*The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulation to that end is not the power to make law* for no such power can be delegate by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, *but operates to create a rule out of harmony with the statute, is a mere nullity.*" (emphasis supplied).

To sustain our point of view that the clear statutory provisions can not be altered, see *U.S.* v. *Missouri*, 278 U.S. 269 and Corpus Juris Secundum, Volume 73, Sec. 69, Page 397, where it reads:

> "*An administrative interpretation out of harmony and contrary to the express provision of a statute cannot be given weight. To do so would in effect amend the statute. Construction may not be substituted for legislation.*" (underlining ours).
>
> Administrative interpretations cannot alter provisions which are clear and explicit and will not overcome a statute which is plain and unambiguous. A statute cannot be altered or amended by the administrative interpretation, and administrative agencies have no power to interpret a statute so as to read words out of it, to rewrite it so as to change its purpose, to extend its coverage beyond it terms, or to make subject to control that which was never the subject of legislative control." (emphasis supplied).

Now, recognizing that the so called administrative practice of 1954 was null and ineffective, the same was in operations until 1969 when express orders were given for purposes that in the collection of the premiums the total of the payroll earned or paid be considered. From that date is that the employers are bound to pay for the totality of the wages and the Administrator of the State Insurance Fund to collect, in a retroactive manner, the premiums that have

not been paid corresponding to the insurance-years 1969-70 (October 1, 1969), 1970-71, 1971-72 and 1972-73.

We do not think that for the fact that the deficiencies of additional premiums on the years mentioned above, in conformity with the instructions contained in Memorandum 147-69 of October 2, 1969, effective October 1, 1969, were notified in the year 1973, to have by itself a legal impediment for their collection under the doctrine of estoppel.

We recognize the doctrine in the case of *Silva* v. *Comision Industrial,* 91 D.P.R. 891 and the applicability of the estoppel theory to governmental agencies. (*Garcia Colon* v. *Secretario de Hacienda,* 99 D.P.R. 779 and the author Davis in "Administrative Law Treatise" (1958 ed.) pages 541-532); only when rights and justice require so. But here we are before a situation wherein the actions of a public officer are not within the scope of the express, restricted and specific faculties of law and that the government can not be responsible for said incorrect and unauthorized acts. In this case there exists reasons of public order—solvency of a Fund—permitting the opposition of orders made contrary to law. See *Marxuach* v. *Diaz,* decided by our Supreme Court on March 11, 1975. We do not think that the case of *Philip Morris* v. *Tribunal Superior,* decided by the Honorable Supreme Court of Puerto Rico (0-74-171) on January 8, 1975, is applicable to the facts of this case. Both cases can be distinguished.

The judicial and procedural technicalities have to be applied to situations where justice require so. The philosophy and basis of the Work's Accident Compensation Law and the public interest resting on it—the welfare and protection of those citizens suffering injuries during the course of their employment—can not, under those technicalities framed in a legal nullity, endanger those funds that guarantee the phylosophy and law postulates.

Based on the foregoing, it is my opinion that the retroactivity prior to 1969-70 does not proceed, as per our reso-

lution of December 27, 1974, notified on January 10, 1975, in which the Arbitrator was the distinguished brother attorney Miguel A. Lopez Rivera, Esq., and that it proceeds the payment of the totality of the payrolls for the premiums corresponding to insurance-years 1969-70, 1970-71, 1971-72 and 1972-73.

Based on the foregoing facts, there is no need to decide if the "premiums or quotas" imposed by the Administrator of the Insurance Funds are contributions.

We want to establish our position in this case that the same is applicable for all legal purposes to those employers that have come before this institution having no effect for those employers that have not come before us.

In San Juan, Puerto Rico, June 18, 1975.

FERNANDO MARTINEZ VELEZ
Arbitrator

(Did not Intervene)
MIGUEL A. GUSMAN SOTO
Associate Commissioner

HERMINIO CONCEPCION
DE GRACIA
Associate Commissioner

(Dissident Vote)
MIGUEL A. LOPEZ RIVERA
Associate Commissioner

EDWIN RAMOS YORDAN
Associate Commissioner

(Certification Omitted in Printing)

IN THE SUPREME COURT OF PUERTO RICO

No. R-70-134

Review

MUNICIPALITY OF CAROLINA, *Plaintiff-appellee*

v.

CARIBBEAN ATLANTIC AIRLINES, INC., *Defendant-appellant*

Mr. JUSTICE CADILLA GINORIO delivered the opinion of the Court.

San Juan, Puerto Rico, February 12, 1974

The Caribbean Atlantic Airlines, Inc. (Caribair) challenges the collection by the Municipality of Carolina of a municipal license tax amounting to $5,125.50 for the fiscal year 1967-68, on the basis of its volume of business during the calendar year 1966.

The Municipality of Carolina levied the aforementioned license tax fees on the airline under the authority of the License Tax Act then in force which granted it power to levy said taxes on every person, firm, association, partnership, corporation or other form whatsoever of commercial or industiral organization engaged in any of the businesses or industries mentioned in said act.[1] In determining municipal revenues, the act establishes, among others, those obtained through commercial and industrial licenses taxes,[2] according to Act No. 26 approved on March 28, 1914, as amended, §§ 621 to 639 of this Title 21. That same § 1479(d) of the aforementioned Title 21 expressly states that the power of the municipalities to levy license taxes is not

[1] See 21 L.P.R.A. §§ 621 and 622.

[2] 21 L.P.R.A. § 1479 (d).

limited to the businesses or industries specified under groups "A", "B" and "C" in § 623 of 21 L.P.R.A., but that said license taxes may be levied also ". . . on such other commercial and industrial establishments as may be provided by the municipal assembly."

A new License Tax Act was approved on June 12, 1971 (Act No. 27 of that year), 21 L.P.R.A. (Cum. Supp. 1973) § 641 *et seq.*, Equity, p. 326, which repealed the former act; and under group "C", it left intact the power of the municipalities to levy license taxes on airlines, when it provided that "[i]n addition to the establishments, businesses, or industries enumerated herein, the municipal assembly is authorized to include and classify within Groups A, B and C, by ordinance or resolution, any other establishments, businesses or industry not enumerated; . . ."

In this case the municipal license tax was levied on the grounds of § 641b of 21 L.P.R.A., ". . . on the basis of the volume of the business for the year immediately preceding . . ."

There existing a difference of opinion between the Municipality and Caribair, since the latter considered that the collection of the amount fixed for license tax did not lie, since under the provisions of the tax exemption provided in Act No. 135 of May 9, 1945, as amended by Act No. 77 of June 20, 1966, 13 L.P.R.A. (Cum. Supp.) § 194, it was exempt from the payment of said license tax, because the latter constituted some kind of tax; and the Municipality considered that the letter of Act No. 135, as amended, is clear and the tax exemption is limited to taxes on personal and real property; and it does not cover municipal license taxes; both parties appeared before the San Juan Part of the Superior Court of Puerto Rico with a petition or request for Declaratory Judgment, where, after raising said difference of opinion with regard to the construction of the said Tax Exemption Act and stipulating the facts set forth, they requested said Court to issue a statement of the ". . .

rights, status or other juridical relations derived therefrom and any order it may deem proper with regard to the determination of whether it is proper for the Municipality of Carolina to collect from Caribair the municipal license tax under the situation described hereinafter."[3]

On April 9, 1970, the San Juan Part of the Superior Court rendered judgment holding that Caribair was bound to pay the aforementioned municipal license taxes.

Caribair appeals before this Court alleging in synthesis that the interpretation made by the Superior Court of Act No. 135 of 1945 is literal, inconsistent with the totality of the Act and with the purpose underlying the tax exemption.

Act No. 135 of May 9, 1945, as amended, 13 L.P.R.A. (Cum. Supp., p. 155) § 194, provides the following in its pertinent part:

"§ 194. Air carriers

"(a) Every natural or artificial person engaged as a public carrier in air transportation service is hereby exempted, as to such service, from the payment of all commonwealth, local and municipal taxes, of whatever name or nature, on all real or personal property now owned or hereafter acquired thereby, including all taxes or excises on equipment or supplies, but not including excise on fuels nor the impost that Act No. 82 of June 26, 1959, authorized the Ports Authority to levy on all aviation gasoline, all fuel products for use and consumption in the propelling of air transportation vehicles and all mixtures of gasoline with any combustible product for use and consumption in the propelling of air transportation vehicles, destined to be consumed in air voyages between Puerto Rico and other places or in air voyages within the territorial limits of Puerto Rico.

[3] The facts and legal provisions set forth above.

"Likewise the planes and the equipment related thereto, leased and owned by a public carrier engaged in the air transportation service are hereby exempt from all property taxes, provided it is established to the satisfaction of the Secretary of the Treasury that such property is being used for such purpose.

"(b) The exemptions provided for in subsection (a) of this section shall in no case be construed as including or covering income tax or premiums payable under the Workmen's Accident Compensation Act, sections 1-42 of Title 11.

"(c) . . ."

At the threshold we will say that when the Lawmaker wanted to exempt entities or businesses exempted from paying taxes over their real or personal property from paying municipal license taxes, he has expressly determined it. Let's take, for example, the provisions of the Puerto Rico Industrial Incentive Act of 1963 (13 L.P.R.A. (Cum. Supp. 1973, p. 178) § 252, subdivision (c), which provides the following:

"§ 252. *Exemptions*

"(a) . . .

"(b) . . .

"(c) Exempted business *shall not be subject to license fees, excise, or other municipal taxes* levied by any ordinance of any municipality, for the periods stated below . . ." (Italics ours.)[4]

And also the provision of subdivision (b) of § 252 of Title 13 of L.P.R.A. (Cum. Supp. 1973, p. 177); and in the

[4] See also subdivision (j)(1), (j)(2), and (j)(3) of said § 252, *supra*.

same sense, in subdivision (b) of § 241 of Title 13, *supra* at p. 166.

A contrarius sensus, if the exemption of subdivision (c) did not exist, the businesses exempted from the payment of taxes over their real or personal property, would have to pay the *license taxes*, excises and other taxes levied by any municipality.

We maintain that a municipal license, in our opinion, is not a tax, but accepting, for the purpose of deciding the question involved in this case, that a municipal license is a tax, we face the problem that the license in controversy here was levied on the basis of the *volume of business*, a power which is granted to the municipalities by the License Tax Act, and not on Caribair's real or personal property. The letter of the Act is clear and precise. The exemption from the payment of all kinds of commonwealth, local and municipal taxes, of whatever name or nature "*. . . on all real or personal property now owned or hereafter acquired thereby. . . .*" (Italics ours.)

We do not think there is any error whatsoever in the syntaxis of the provision, nor that any ambiguity whatsoever is created by including the aforementioned phrase with regard to the fact that the exemption is granted on the real or personal property. There is no such "*literal interpretation*" as Caribair alleges. When the letter of the law is clear and free from all ambiguity, it should not be disregarded under the pretext of fulfilling the spirit thereof. Civil Code, 1930, art. 14; 31 L.P.R.A. § 14. There is no ambiguity whatsoever in the provision of law, when it clearly establishes that the exemption is with regard to the carrier's real or personal property.

Provision (b) of § 194, *supra*, clarifies that neither the income tax nor the premiums payable under the Workmen's Accident Compensation Act are included in the exemption. It is natural that it has been thus clarified in order to avoid

the interpretation to the effect that the carrier was exempt from paying those taxes, because, in the first place: (1) income tax is levied upon the *net income* of every individual, corporation or partnership. (13 L.P.R.A. (Cum. Supp. 1973, p. 10) §§ 3011 and 3012.)

"*Ingreso*" (income) is the wealth which comes into one's possession; and "*ingresar*" (to come in) means the coming in of something, *specially money*.[5] (Italics ours.)

Since the tax is levied upon the net income received during the year; *and that money constitutes personal property* of the taxpayer, the Lawmaker deemed it proper to exclude that tax from the exemption; and (2) substantially the same thing happens with regard to the premiums for workmen's compensation. It has been held that contributions collected for the support of the state industrial accident fund, constitute "taxes".[6]

In *State Industrial Accident Commission* v. *Aebi*, 177 Or. 361; 162 P. 2d 513; 161 A.L.R. 211, it is held that an exaction imposed by the Workmen's Compensation Act upon employers is nonetheless a tax because it applies to employers engaged in occupations declared to be hazardous by the Act.[7]

Said case of Aebi, *supra*, cites approvingly, the definition of the term "tax" as applicable to contributions required of employers under the Wisconsin Unemployment Act,

---

[5] *Vox: Dic. Gen. Ilustrado de la Lengua Española*; Edit. Biblograph, S.A. Barcelona, 1970.

[6] "Contributions exacted for the support of a state industrial accident fund have been held *to constitute taxes.*" (Italics ours.) 58 Am. Jur. § 553, p. 921; *op. cit.* at p. 922.

[7] ". . . an exaction imposed by the workmen's compensation statute upon employers is nonetheless a tax because it applies to such employers as are engaged in occupations declared by the statute to be hazardous." (See case of Aebi, *supra*.)

given by the eminent former Chief Justice Hughes of the Supreme Court of the United States, while sitting as Associate Justice, which definition reads as follows:

> "A tax is an enforced contribution for the payment of public expenses. It is laid by some rule of apportionment according to which the persons or property taxed share the public burden, and whether taxation operates upon all within the state, or upon those of a given class or locality, its essential nature is the same."[8]

The tax levied on the employer is based on the amount in dollars and cents of the current payroll of the wages paid to all his workmen and employees. 11 L.P.R.A. § 20. That money, the amount of the payroll, partakes of the nature of a personal property; and since it is *a tax on the personal property* of the employer, the Lawmaker, necessarily, had to express clearly that the tax exemption granted to Caribair did not include that tax.

The Lawmaker specifically excluded from the exemption: (1) the excises on fuel; and (2) the impost of two (2) cents per gallon of gasoline which the Act of June 26, 1959 authorized the Legislature to levy on all aviation gasoline. In our opinion, those two exemptions lack importance, to support the opinion to the effect that Caribair is exempt from the payment of the municipal license tax challenged. Let us see:

Act No. 135 approved on May 9, 1945 (Sess. Laws of that year, p. 456) provides the following:

---

[8] (Mr. Justice Hughes in *Houck* v. *Little River Drainage District*, 239 U.S. 254, 36 S. Ct. 58; *In re Oshkosh Foundry Co.*, 28 Fed. Supp. 412, 414; and also by the Federal District Judge in *Aebi, supra*).

* EDITOR'S NOTE: We omit the citation included in this footnote because it appears above as part of the text of the opinion.

> "Section 1. Every natural or artificial person engaged as a public carrier in international air transportation service is exempted, as to such services, from the payment of all insular, local, and municipal taxes, whatever its name or nature, *on all of the real or personal property* which he may now own or may hereafter acquire, including all taxes or excises on fuels, lubricants, equipment, or materials.
>
> "Section 2. The exemptions provided for in Section 1 shall in no case be construed as including or covering income tax or premiums payable under the Workmen's Accident Compensation Act." (Italics ours.)

This Act originally expressly included also the air carrier's fuels, lubricants, equipment or materials as personal exempt property.

This Act was amended, and its text in force, in its pertinent part, is that appearing at pages 3 and 4 of this opinion (13 L.P.R.A. (Cum. Supp., p. 155) § 194); and contrary to the original version of 1945, *supra*, which expressly included in the exemption all the taxes or excises on fuels, lubricants, equipment or materials, this new Act does not include in the exemption the ". . . excise on fuels nor the impost that Act No. 82 of June 26, 1949, authorized the Ports Authority to levy on all aviation gasoline, all fuel products for use and consumption in the propelling of air transportation vehicles and all mixtures of gasoline with any combustible product for use and consumption in the propelling of air transportation vehicles, destined to be consumed in air voyages between Puerto Rico and other places or in air voyages within the territorial limits of Puerto Rico."

The excises on fuels were established by virtue of the provisions of Act No. 21, approved on January 20, 1956 (Excise Act of Puerto Rico, 13 L.P.R.A. § 4030). Such excises constituted a tax levied on all fuels, which had and

have the nature of a personal property. But that tax was *suspended* by the provisions of art. 1 of Act No. 82, approved on June 26, 1959 (Sess. Laws of that year, p. 217; 13 L.P.R.A. § 4030 (note in the History)), "... if the Ports Authority *levies, in lieu of said tax, an impost of two cents,* on each gallon or fraction of a gallon of said products and collects it from the suppliers thereof operating in the airports of Puerto Rico." (Italics ours.) The term "supplier", as defined in the Act itself means, any natural or artificial person engaged in the business of supplying the above-mentioned products, and it shall also mean the consumers of said products in case they may import them directly.

Upon *suspending* the tax levied on the fuels, which constitute personal property, and substituting it by the two cents *impost* which the Legislature authorized the Ports Authority to levy for each gallon or fraction of gallon of said products, undoubtedly the Legislature deemed it proper to expressly state that that substitute impost of two cents should not be considered as another tax, since it was not a tax, but an "impost" in order to provide the Ports Authority with its own resources independent from the taxing power of the State, for the financing of capital improvements. The Legislature did not have the benefit of the judicial interpretation given by this Court to the aforementioned Act in the case of *Esso Standard Oil* v. *P.R.P.A.*, 95 P.R.R. 754 (1968) (Ramírez Bages) where we stated that for the purpose of providing the Authority with its own revenue it was authorized *to levy an impost so characterized to distinguish it from the tax which was suspended* since the taxes are levied for the sole purpose of producing revenues, and in that case, the impost did not seek that purpose, but to produce income to a public instrumentality for the necessary and adequate financing of its aims and purposes. That case of Esso, *supra,* shows that there existed the possibility of alleging that the aforementioned "impost was a tax; since in that case it was alleged that

it was a tax like the one it substituted; and that, therefore, as the intervenor Carribean Atlantic Airlines, Inc. maintained there, the exemption which had been granted to it included the "impost" in question; this Court said in said case:

> "Summarizing, from the foregoing it is evident that the impost, which the Legislature authorized appellee to collect, is actually a fee for services and use of facilities and not a tax like the one it substituted, ..." (*Esso, supra.*)

Therefore, we understand that the Legislature wanted to avoid doubts, and stated that the aforementioned impost of two cents was not included in the exemption granted to Caribair.

We have repeatedly held that tax exemptions are derogations of the power of a state and that they must not extend beyond the express and exact terms of the statute granting them and that every doubt must be resolved against exemption from taxation. (*The Texas Co.* v. *Tax Court; Descartes, Int.*, 82 P.R.R. 129, 154 (1961), *cf. American Nat. Bldg.* v. *City of Baltimore,* 224 A.2d 883 Md. 1966).)

The expressed, specific and exact terms of the statute granting the exemption, involved herein, clearly express that the exemption granted is on the carrier's *personal or real property;* and the license tax challenged is not a tax on the carrier's personal or real property, as we have set forth above.

For the reasons stated, judgment is rendered affirming the judgment of the Superior Court, San Juan Part, of April 9, 1970.

Mr. Justice Torres Rigual concurs in the result; and Mr. Justice Rigau, Mr. Justice Dávila, and Mr. Justice Díaz Cruz, dissented.

IN THE SUPREME COURT OF PUERTO RICO

(Caption Omitted in Printing)

MR. JUSTICE DIAZ CRUZ, with whom MR. JUSTICE RIGAU and MR. JUSTICE DAVILA concur, dissenting.

San Juan, Puerto Rico, February 12, 1974

A local airline (Caribair) appeals from a judgment of the Superior Court, San Juan Part, which rules that the letter of Act No. 135 of May 9, 1945, as amended (13 L.P.R.A. § 194) does not exempt it from the payment of municipal license taxes to the Municipality of Carolina; insofar as pertinent said Act reads:

"§ 194. Air carriers

"(a) Every natural or artificial person engaged as a public carrier in air transportation service is hereby exempted, as to such service, from the payment of all commonwealth, local and municipal taxes, of whatever name or nature, on all real or personal property now owned or hereafter acquired thereby, including all taxes or excises on equipment or supplies, ..."

The opinion of the majority affirms the judgment appealed from on the grounds that the exemption is "granted . . . on the carrier's personal or real property; and the license tax challenged is not a tax on the carrier's personal or real property." It reaches this conclusion saying that the license tax is levied on the "volume of business" (21 L.P.R.A. (Cum. Supp. 1973) § 64lb) concept which cannot be classified as personal or real property. Could there be a volume of business if there is no personal or real property invested in the commercial traffic and in the industrial development? The volume of business is not extracted as hydrogen from the air. It is nothing more than the product or fruit of the goods introduced in the market and is therefore

a figure inseparable from the property generating it. The literal interpretation[1] defeats the well-known purpose of the legislation implementing the Economic Development program in our country. If tax exemption is perhaps the greatest incentive designated for the development of the country, how are we going to apply strict rules of construction which were acceptable during a time where it was more important to collect taxes than to create employments and develop wealth through the stimulation of the private enterprise?

The "volume of business" is not a figure detached from the exempt operation; it represents income obtained through capital (property) invested in industrial activity. Tax exemption seeks to promote and create not only new and additional sources of employment in industrial operations but to maintain them in operation in order to cut down unemployment until it is eliminated. The intent of the exemption in question is to effect a greatly needed social and economic purpose for the well-being of the community. If income is derived from activities which in the normal operation of a business tend to carry out the purpose of the legislature and which constitute the proper and adequate activities to reach such purpose, and which were foreseen as may be reasonably determined from the provisions of the statute under consideration, such income falls within the ambit of the exemption.

Proctor Mfg. Corp. v. *Sec. of the Treasury*, 91 P.R.R. 806, 814 (1965) (Ramírez Bages, J.).

"[1, 2] With the foregoing in mind, it is easy to understand that the industrial tax exemptions granted by the Government of Puerto Rico should not be inter-

[1] The courts should not follow the already discredited practice of defeating the purposes of the statutes by giving undue weight to the rules of interpretation of the same. *Alvarez & Pascual* v. *Sec. of the Treasury*, 84 P.R.R. 463, 471 (1962) (Rigau, J.).

preted as the former tax exemptions which were privileges, for which reason their restrictive interpretation was beneficial to the public interest. On the contrary, the *industrial* tax exemptions should be interpreted in consonance with their creative purpose. It is in this way alone that the legislative intent will be accomplished and, furthermore, that faithful and reasonable interpretation is the beneficial interpretation to the public interest. The industrial tax exemption is not a grace, in the old sense of the phrase, conferred by the Government of Puerto Rico, but it is an instrument utilized in Puerto Rico to promote industrial development and productive investment, all for the final goal of offering to the inhabitants of the country a civilized, material, and spiritual life. Said tax exemptions are a realistic and effective tool in the strife of the country to eliminate the 'subhuman' conditions which still exist in certain areas." *Textile Dye Works, Inc.* v. *Sec. of Treasury*, 95 P.R.R. 692, 697 (1968) (Rigau, J.).

In accepting only for the sake of argument that a municipal license is a tax, the opinion ignores that the lawmaker classified it as a tax in the Municipal Law in providing the following:

> "§ 1173. Duties
>
> "The municipal assembly shall have, among others, the following special duties, subject to the other provisions of this subtitle:
>
> . . . .
>
> "(6) The levying of reasonable *taxes* within the jurisdictional limits of the municipality; Provided, That for the purpose of the application of the industrial and commercial license tax act enacted by the Legislature of Puerto Rico on March 28, 1914, as amended, sections 621-639 of this title, the municipal assembly is hereby authorized to include through ordinance or

> resolution, any industrial or business establishments or agencies not enumerated in such sections." (21 L.P.R.A. § 1173, sub. 6.) (Italics ours.)

The license tax levied by Carolina affects and encumbers the personal and real property of appellant and cuts down the exemption granted through the action of the Legislature. The action of the Municipality cannot prevail.

The judgment should be reversed recognizing the exemption of law.

(Certificate Omitted in Printing)